Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

THE CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, AND CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, AND CITY ATTORNEY,

Petitioners,

v.

THE BANK OF AMERICA; WELLS FARGO BANK N.A., CALIFORNIA FEDERAL BANK, AND THE CALIFORNIA BANKERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency's regulation interpreting the National Bank Act to allow national banks to charge fees, 12 C.F.R. § 7.4002, implicitly preempts a state or local law that prevents banks from double-charging non-accountholders who use their automated teller machines.

2. Whether the Office of Thrift Supervision's regulations under the Home Owners Loan Act governing the operations of federal savings and loans, 12 C.F.R. § 545 *et seq.*, and its Electronic Operations Rules, 12 C.F.R. § 555 *et seq.*, occupy the field of automated teller machine services to the extent that they preempt a state or local law that prevents banks from double-charging non-accountholders who use their automated teller machines.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following individuals were sued in their official capacity: Willie L. Brown, Mayor of the City of San Francisco; Tom Ammiano, President, Board of Supervisors, City and County of San Francisco; Alicia Becerril, Supervisor; Sue Bierman, Supervisor; Amos Brown, Supervisor; Leslie Katz, Supervisor; Barbara Kaufman, Supervisor; Mark Leno, Supervisor; Gavin Newsom, Supervisor; Mabel Teng, Supervisor; Michael Yaki, Supervisor; Leland Yee, Supervisor; Louise H. Renne, City Attorney for the City and County of San Francisco, Pamela O'Connor, Mayor of the City of Santa Monica; Ken Genser, Mayor *pro Tempore* of the City of Santa Monica; Richard Bloom, Council Member; Michael Feinstein, Council Member; Robert T. Holbrook, Council Member; Kevin McKeown, Council Member; Paul Rosenstein, Council Member; and Marsha Jones Moutrie, City Attorney for the City of Santa Monica.

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PETITION FOR A WRIT OF CERTIORARI

The City and County of San Francisco and the City of Santa Monica respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals panel, as amended on denial of rehearing (App. 1-26) is reported at 309 F.3d 551. The opinion of the district court (App. 27-36) is unreported, but is available on the Westlaw database at 2000 WL 33376673 (June 30, 2000).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2002. A timely petition for rehearing was denied on December 20, 2002. App. 4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes and regulations are reproduced in the Appendix. The statutes involved are 12 U.S.C. §§ 24 (Seventh) and 43; 12 U.S.C. § 1464(b)(1)(F); and 15 U.S.C. §§ 1693, 1693a, 1693b, and 1693q. The pertinent regulations are 12 C.F.R. § 7.4002; 12 C.F.R. §§ 545.2 and 545.17; 12 C.F.R. § 555.200; and 12 C.F.R. §§ 557.11, 557.12, and 557.13.

STATEMENT

This case is about state and local governments' traditional power to legislate to protect their citizens' consumer rights. The cities of San Francisco and Santa Monica passed laws prohibiting financial institutions from double-charging non-account holders who use their automated teller machines (ATMs) to access accounts at other institutions. Many state and local governments and banks view this lawsuit as a test case for similar laws under consideration across the country.[1]

One writer recently referred to federal preemption of state banking rules as a "bubbling, rising, hot issue" in which "the whole states' rights issue has become twisted and contorted." App. 74. And the First Circuit has recognized the "pivotal importance and broad commercial consequence" of federal preemption over state laws regarding bank fees. *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 821 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).

The Ninth Circuit held that the governing statutes for national banks and federal savings and loans – the National Bank Act and the Home Owners Loan Act – implicitly preempt the San Francisco and Santa Monica laws. The Ninth Circuit reasoned that any state or local law limiting or prohibiting a bank fee must conflict with the general permission that national banks and federal savings associations have to charge fees under federal law. The case thus has implications far beyond the particular

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[1] *See, e.g.*, Ginger A. Bagley, Comment, *Can't Get Money for Nothing: An Analysis of ATM Surcharge Ban Demand*, 6 N.C. Banking Inst. 595, 607-08 (2002); App. 68-70.

ATM surcharges at issue, and affects any state or local consumer protection legislation in areas that national banks or federal savings and loans have permission to operate.

The Court should grant certiorari. The Ninth Circuit's interpretation of the preemptive effect of the Comptroller of the Currency's regulation allowing national banks to charge non-interest fees is in direct conflict with opinions by the Eleventh Circuit and the California Supreme Court. Further, the Ninth Circuit's refusal to apply the presumption against preemption in this context conflicts directly with opinions by the First, Third, and Eleventh Circuits, and the California Supreme Court. Finally, the Ninth Circuit's conclusion that the Home Owners Loan Act preempts the field of state substantive laws that regulate federal savings and loans conflicts in principle with opinions by the Eighth and Eleventh Circuits.

A. Statutory Background

1. The National Bank Act

National banks derive their ability to charge fees from the Comptroller of the Currency's ("OCC") regulatory interpretation of section 24 (Seventh) of the National Bank Act, which provides that national banks may exercise such "incidental powers" as are necessary to carry on the business of banking. One commentator has described an incidental power as "an adjunct power, only permissible if it furthers granted powers." Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 690 (1983). The District of Columbia Circuit has described incidental powers as "a poster child

for ambiguity." *Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000).

The National Bank Act does not expressly allow national banks to charge fees. 12 U.S.C. § 24 (Seventh). Indeed, Congress did not originally grant national banks the power to make profits. *Huntington v. National Savings Bank of the District of Columbia*, 96 U.S. 388, 394-95 (1878). Through its regulatory authority, the OCC has given national banks permission to charge non-interest fees. 12 C.F.R. § 7.4002. This rule states that a "national bank may charge its customers non-interest charges and fees, including deposit account service charges." *Id.*

The current rule does not expressly preempt state or local laws limiting or prohibiting particular national bank fees. The OCC withdrew a previous regulation that expressly preempted state laws limiting national bank service charges in 1996. 12 C.F.R. § 7.8000(c) (App. 51-52). The OCC withdrew § 7.8000 after Congress had indicated its support for the California Supreme Court's opinion in *Perdue v. Crocker National Bank,* 702 P.2d 503 (Cal. S.Ct. 1985), *appeal dismissed*, 475 U.S. 1100 (1986). OCC Notice of Final Rule, 61 Fed. Reg. 4849, 4859 (February 9, 1996). In *Perdue*, the California Supreme Court held that § 7.8000 was unreasonably preemptive of state laws regulating fees.

From 1996 through early 2001, the OCC regulation provided at § 7.4002(d) that the OCC would evaluate "on a case-by-case basis" whether the rule preempted any

particular state law limiting or prohibiting a national bank fee. App. 50. When San Francisco and Santa Monica argued below that this language was inconsistent with the OCC's litigating position that the regulation still preempted all state laws affecting national bank fees, the OCC amended the rule again. With explicit reference to this lawsuit, the OCC amended § 7.4002(d) to remove the clause providing for a "case-by-case" preemption review. OCC Final Rule, 66 Fed. Reg. 34784, 34787 and n.12 (July 2, 2001). But the OCC was careful to note that it intended no substantive change to the rule, and that it would continue to review national bank preemption of state fee laws on a case-by-case basis. *Id.*

2. The Home Owners Loan Act

Congress enacted the Home Owners Loan Act (HOLA), 12 U.S.C. §§ 1461 *et seq.*, during the Great Depression "to provide emergency relief with respect to home mortgage indebtedness at a time when as many as half of all home loans in the country were in default." *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 160 (1982). The Office of Thrift Supervision (OTS) has the regulatory authority to determine the "best practices" of federal savings associations. *Id.* at 162.

HOLA allows federal savings associations to establish "remote service units" to engage in various deposit and loan-related transactions as well as "for the disposition of other related financial transactions, as provided in regulations" promulgated by the OTS. 12 U.S.C. § 1464(b)(1)(F). In its regulations governing the operations of federal

savings associations, the OTS allows federal savings associations to transfer its customers' funds "with or without fee" from its customers' accounts "by any mechanism or device, including cashier's checks, conforming with applicable laws and established commercial practices." 12 C.F.R. § 545.17. In another regulation, the OTS claims that its operations rules preempt "any state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. § 545.2.

In 1998, the OTS promulgated the Electronic Operations Rules, which authorize federal savings and loans to engage in electronic transactions, and to use ATMs to provide banking services. OTS Electronic Operations Rules, 63 Fed. Reg. 65673 (1998); 12 C.F.R. §§ 555.100, 555.200, and 555.210. In its preamble to these rules, the OTS included a three-part test to determine whether HOLA preempts a state or local law affecting ATM or other electronic transactions. They provide that HOLA "will have preemptive effect" to:

> (1) facilitate the safe and sound operations of a Federal savings association,
>
> (2) enable a Federal Savings association to operate according to the best thrift institution practices in the United States, or
>
> (3) further other purposes of the HOLA. *Id.* at 65681.

The preamble rejects field preemption of all state and local regulation of ATM transactions in favor of a "case by case approach." *Id.* The preamble also offers a test to determine when HOLA does not preempt state laws that affect ATM or other electronic operations:

> OTS will determine that a state law regulating electronic operations is not preempted if it furthers a vital state interest, and either has only an incidental effect on Federal savings associations' ability to provide financial services electronically or is not otherwise contrary to the provisions of OTS' rule. *Id.*

3. The Electronic Funds Transfer Act

Congress passed the Electronic Funds Transfer Act (EFTA), 15 U.S.C. §§ 1693 *et seq.* in 1978 to provide a "basic framework" to protect the rights of consumers in electronic fund transfers, including ATM transactions. 15 U.S.C. § 1693(b). The EFTA applies to national banks and federal savings and loans, among other financial institutions. 15 U.S.C. § 1693a(8).

The legislative history to the act states that Congress intended the EFTA to set "only minimum national standards" for ATM and other electronic transactions. S.Rep. No. 915, 95th Cong., 2d Sess. 19. Congress rejected uniform national standards for electronic funds transactions "because it would contravene Congress' longstanding policy of deferring to those States which choose to provide more stringent consumer safeguards." *Id.* at 18, 19. To accomplish this purpose, the EFTA allows state and local governments to adopt stricter consumer protections than those set forth in the statute:

> A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter. 15 U.S.C. § 1693q.

In 1999, Congress passed the "ATM Fee Reform Act" as part of the Gramm-Leach-Bliley Financial Services Act, which amended the EFTA to provide specific rules regarding ATM fees. ATM Fee Reform Act of 1999, Pub. L. No. 106-102, §§ 701-10, 113 Stat. 1338, 1463 (1999); 15 U.S.C. § 1693b. These amendments prohibit financial institutions, including national banks and federal savings associations, from surcharging any user of an ATM machine without first disclosing the surcharge and allowing the user to opt out of the transaction. Previous federal attempts to ban ATM surcharges outright have all been proposed as amendments to the EFTA.[2]

B. Factual Background

1. ATM Networks and Transaction Fees

Over the last 20 years, national and regional computer networks have linked ATM machines, allowing ATM owners to provide a new service: electronic access to a bank account from any ATM, regardless of its owner. ER 101.[3] Not just banks, but also convenience stores, supermarkets, restaurants, and anyone willing to pay the cost of the ATM and the network membership fee, can provide computer network access through ATMs. ER 114.

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[2] E.g., Fair Access to Money (ATM) Act, H.R. 1047, 107th Cong. (2001); Electronic Fund Transfer Fees Act of 1999, H.R. 3229, 106th Cong. (1999); The State And Local Automated Teller Machine Regulation Protection Act of 1999, H.R. 3494, 106th Cong. (1999); ATM Surcharge Elimination and Consumer Empowerment Act, H.R. 3503, 106th Cong. (1999).

[3] Record citations follow the abbreviations used in the court of appeals for the Excerpts of Record (ER).

Companies such as Plus System, Cirrus, and Star own these computer networks. ER 101.

The ATM networks link consumers and their banks without regard to who owns the ATM that the consumer uses. For example, a consumer who uses a Wells Fargo ATM to withdraw cash from a credit union account makes the withdrawal from the credit union, not Wells Fargo. ER 123. Wells Fargo merely acts as a conduit, allowing the consumer to connect to the computer network that provides access to the credit union. *Id.*

Three parties share the cost of an ATM transaction in which a consumer uses one bank's ATM to access an account at another bank: (1) the owner of the computer network that carries the transaction, (2) the owner of the ATM terminal that originates the transaction, and (3) the bank holding the account that the transaction affects. ER 101-102. The transaction involves the following exchange of fees:

- The *interchange fee*. The bank that holds the accessed account pays a fee to the ATM owner of about 50 cents per transaction. ER 102. This fee more than covers the ATM owner's transaction cost, which is only 27 cents. ER 110.
- The *switch fee*. The bank that holds the accessed account also pays a fee to the company that owns the ATM network. ER 102. This fee ranges from 5 to 10 cents per transaction. ER 116.
- The *foreign fee*. The bank that holds the accessed account charges its customer whenever the customer uses an ATM that the bank does

> not own. ER 102. The Banks usually charge their accountholders $2.00 per transaction as a foreign fee, which appears on the accountholders' bank statement. *Id.*

Since 1996, when the companies that own the major ATM networks lifted their ban on the practice, most ATM owners have begun charging non-accountholders an additional fee to process their ATM transaction. ER 102. The additional fee is commonly known as an "ATM surcharge," because ATM owners add it to the interchange fee, which already compensate them for the transaction. The consumer also pays twice, through the foreign fee and the surcharge. The surcharge is typically $1.50, and almost 99% of the bank-owned ATMs in California charge it. ER 102. The percentage of banks that impose this surcharge nationwide grew from 15% in 1996 to 94% in 2001. Karen E. Coughlin, *ATM Surcharges Violate the Public Policies that Underlie the Antitrust Laws*, 35 Colum. J.L. & Soc. Probs. 217, 228 (2002).

2. The San Francisco and Santa Monica Ordinances

In 1999, San Francisco's voters and Santa Monica's city council passed similar ordinances to prohibit the ATM surcharge. App. 56-67. The stated purpose of each ordinance "is to protect consumers from exorbitant and unfair fees and to protect smaller financial institutions from anti-competitive business tactics." App. 59, 64-65.

The ordinances do not require financial institutions to provide any service for free. The traditional fees exchanged during the type of transaction that the ordinances cover – the foreign fee, the switch fee, and the interchange

fee – more than compensate the ATM's owner for its transaction costs. ER 120. Indeed, when Washington Mutual Savings Bank voluntarily eliminated its ATM surcharge in October, 2000, the bank's president of banking and financial services reported that the change was "not going to have any significant impact on our financials." App. 71.

C. Proceedings Below

The national bank respondents and the California Bankers Association sued San Francisco and Santa Monica in the district court for the Northern District of California on November 3, 1999, the day after San Francisco's voters approved their ordinance. On November 15, 1999, the district court entered a preliminary injunction against both ordinances. California Federal Savings Bank intervened in the case on January 20, 2000. The district court entered summary judgment in the respondent banks' favor on July 11, 2000.

The Ninth Circuit affirmed the district court. The Ninth Circuit found that the OCC's regulation permitting national banks to charge fees, 12 C.F.R. § 7.4002, implicitly preempted "state limitations on the authority of national banks to collect fees for provision of deposit and lending-related electronic services." App. 21. The Ninth Circuit gave "great weight" to the OCC's position – in its amicus brief supporting Respondents – that national banks' permission to impose the ATM surcharge on non-depositors was an incidental power of national banks under § 24 (Seventh) of the National Bank Act. App. 19.

The Ninth Circuit found that HOLA also preempted the ordinances. App. 14. The Ninth Circuit noted that

HOLA allows federal savings associations to establish remote service units to engage in various financial transactions authorized by the Office of Thrift Supervision. App. 13 (citing 12 U.S.C. § 1464(b)(1)(F) (App. 40-42)). The Ninth Circuit concluded that the ordinances affected a federal savings association's operations within the meaning of the OTS operations rules, at 12 C.F.R. §§ 545 *et seq.* App. 15. Because these rules expressly preempt the field of federal savings associations' operations, the Ninth Circuit concluded that they preempted the ordinances. *Id.*

The Ninth Circuit dismissed as "illogical" San Francisco and Santa Monica's position that the OTS operations rules did not govern the ATM transactions at issue here, notwithstanding the OTS' stated intention that its more recent Electronic Operations Rules govern these transactions. OTS Electronic Operations Rules, 63 Fed. Reg. 65673, 65681 (1998). Unlike the operations rules, the Electronic Operations Rules avoid the field preemption approach that the Ninth Circuit adopted. *Id.* ("OTS believes it is premature to craft specific preemption regulations in the area of electronic operations."). The Ninth Circuit did not discuss this aspect of the Electronic Operations Rules.

San Francisco and Santa Monica argued below that the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 *et seq.*, showed congressional intent to preserve state and local consumer protection laws relating to ATM surcharges, and that the Ninth Circuit had acknowledged as much when it decided *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186, 1195 (9th Cir. 1990). The Ninth Circuit rejected this argument, holding that Petitioners' ordinances were "not the type of consumer

protection measure contemplated by the Electronic Funds Transfer Act." App. 21.

The Ninth Circuit ignored its earlier opinion in *Valley Bank*, which addressed the same ATM surcharges and held that through the EFTA, "Congress specifically has declined to restrict state regulation in the ATM context." *Valley Bank*, 914 F.2d at 1195. In *Valley Bank*, the Ninth Circuit had also quoted EFTA legislative history showing Congressional intent to "permit[ ] the States to enact legislation affording greater consumer protection" than federal law, and noted that Congress specifically rejected national uniformity in ATM regulation. *Id.* (quoting S.Rep. No. 915, 95th Cong. 18 (1978)).

Petitioners sought rehearing *en banc*, which was denied in an amended panel opinion issued on December 20, 2002. App. 4.

REASONS FOR GRANTING THE PETITION

Interpreting the National Bank Act in a way that both the Eleventh Circuit and the California Supreme Court have rejected as "palpably erroneous," the Ninth Circuit held that because federally chartered financial institutions have the general regulatory permission to charge non-interest fees, no state or city may pass a law that limits or prohibits a bank fee. This holding conflicts directly with Eleventh Circuit and California Supreme Court decisions. And in a further conflict with the First, Third and Eleventh Circuits, and with two California Supreme Court decisions (one affirmed by this Court), the Ninth Circuit refused to apply this Court's presumption against preemption in the banking context.

The Ninth Circuit's conclusion that the Home Owners Loan Act preempts the field of state substantive laws that regulate federal savings and loans conflicts in principle with opinions by the Eighth and Eleventh Circuits, and is inconsistent with a previous Ninth Circuit opinion that this Court affirmed.

This Court's opinion in another National Bank Act preemption case – *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735 (1996) – demonstrates the cert-worthiness of this preemption issue. In *Citibank*, the Court held that a credit card holder's state law claim challenging excessive late charges to her account was preempted by the National Bank Act because the late charges were "interest" under section 85 of that law. *Id.* at 745. This case addresses whether the National Bank Act also preempts state laws regarding non-interest fees. Under the Ninth Circuit's analysis below, a state law against an excessive fee would be preempted whether or not the fee was interest, thus undercutting the purpose of the distinction that this Court drew in *Smiley*.

As in any case about preemption, the Ninth Circuit should have allowed congressional intent to guide it. Instead, the Ninth Circuit ignored direct evidence of congressional intent expressed in the very statutes at issue, in regulations, and in detailed legislative history. The Court should grant certiorari to guide the many state and local governments that have passed laws to protect their consumers in banking and electronic financial transactions, or that will pass such laws in the future.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE ELEVENTH, NINTH, AND FIFTH CIRCUITS AND THE CALIFORNIA SUPREME COURT OVER THE PREEMPTIVE EFFECT OF THE OCC REGULATION THAT ALLOWS NATIONAL BANKS TO CHARGE FEES.

The conflict in precedent that this case raises is direct. The Eleventh Circuit and the California Supreme Court have held that the Comptroller of the Currency's regulation permitting national banks to charge non-interest fees does not implicitly preempt state laws that limit those fees. *Video Trax, Inc. v. Nationsbank, N.A. (South)*, 205 F.3d 1358 (11th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Perdue v. Crocker National Bank*, 702 P.2d 503 (Cal. S.Ct. 1985), *appeal dismissed*, 475 U.S. 1100 (1986). The Ninth and Fifth Circuits have held that it does. App. 1-26; *Wells Fargo Bank of Texas N.A. v. James*, ___ F.3d ___ (2003 WL 245633) (5th Cir. 2003) (not yet published). The conflict is also irreconcilable. If the Eleventh Circuit and the California Supreme Court are correct, then states may pass consumer protection laws that may limit a bank's fee; if the Ninth and Fifth Circuits are correct, then they may not.

A. The Courts are in Conflict Over the Preemptive Effect of National Banks' Regulatory Permission to Charge Fees.

Both the California Supreme Court and the Eleventh Circuit have recognized that national banks' general regulatory authority to charge non-interest fees cannot preempt all state laws that might limit those fees. In *Perdue v. Crocker National Bank*, the California Supreme

Court found this notion "palpably erroneous," and held that the National Bank Act did not preempt a state law against unconscionable or unreasonable bank fees. 702 P.2d at 521. The *Perdue* court held that the implied authority to charge fees under the section 24 (Seventh) incidental powers was not so comprehensive as to displace state laws limiting national banks' fees. *Id.*

The California Supreme Court also rejected the argument that a state law against unreasonable bank charges would impede national banks' ability to attract deposits, thus conflicting with the National Bank Act along the lines of this Court's decision in *Franklin National Bank v. New York*, 347 U.S. 373 (1954) (finding preempted a state law that prevented national banks from using the word "savings" in their advertising because it impeded their ability to attract deposits). *Perdue*, 702 P.2d at 522. The California Supreme Court refused to extend this Court's holding in *Franklin* "into the broader proposition that every possible term or practice which may be the subject of competition between banks is beyond the reach of state law." *Id.*

The *Perdue* court found evidence of congressional intent to preserve state regulation of bank fees even in the face of general banking deregulation at the federal level. When Congress preempted state usury laws through the Federal Reserve Act of 1980, it deliberately left in effect other state laws regulating national bank fees charged to depositors. *Id.* (citing S.Rep. No. 368, 96th Cong., 1st Sess. 19 (1979), which recognized that states could limit national banks' "prepayment charges, attorney fees, late charges," or other similar fees.)

The California Supreme Court's decision in *Perdue* carries particular weight because Congress expressly approved of the decision in criticizing OCC preemption positions. OCC Notice of Final Rule, 61 Fed. Reg. 4849, 4859 (February 9, 1996) ("In addition, the conference report cited *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. S.Ct. 1985), *appeal dismissed*, 475 U.S. 1100 (1986), which held that § 7.8000 is not a valid finding of Federal preemption, in part, because Congress had not established a comprehensive Federal statutory scheme governing the taking of deposits.") And acknowledging Congress' approval of *Perdue*, the OCC withdrew a regulation that took the same approach to preemption as the Ninth Circuit did in this case. *Id.*

The Eleventh Circuit has followed the California Supreme Court in rejecting a blanket federal preemption of state laws limiting bank service charges. In *Video Trax, Inc. v. Nationsbank, N.A. (South)*, 205 F.3d 1358 (11th Cir.), *cert. denied*, 531 U.S. 822 (2000), the Eleventh Circuit affirmed and adopted *verbatim* the district court's analysis that national banks' authority to charge fees under section 24 (Seventh) of the National Bank Act did not preempt state laws limiting bank service charges. Like the California Supreme Court, the Eleventh Circuit acknowledged the states' historic role in regulating banking. *Id.* (adopting language from 33 F.Supp.2d at 1048). And the Eleventh Circuit distinguished the area of non-interest bank charges, where it did not find preemption, to the area of interest charges, where preemption is express. *Id.* (adopting language from 33 F.Supp.2d at 1049).

Following the California Supreme Court, the Eleventh Circuit rejected as "palpably erroneous" the reasoning on

which the Ninth Circuit relied in this case. *Id.* (adopting language from 33 F.Supp.2d at 1049). The district court had also rejected as "simply untenable" the argument that "even though the federal government has largely declined to regulate this area, Congress has nevertheless decided to preclude state regulation." *Video Trax, Inc. v. Nationsbank, N.A. (South)*, 33 F.Supp.2d 1041, 1058 (S.D. Fla. 1998).

In contrast, the Ninth Circuit held that the general authority to collect non-interest charges and fees under § 7.4002 preempts any state fee limitation. App. 21. The Ninth Circuit referred to federal legislation in banking since *M'Culloch v. Maryland*, 17 U.S. 316 (1819), without regard to any state role outside narrow areas such as zoning, taxation, or tort law. App. 10-11. The Ninth Circuit did not acknowledge the Eleventh Circuit's or the California Supreme Court's contrary authority.

The Ninth Circuit's broad interpretation of the preemptive effect of § 24 (Seventh) also conflicts in principle with Eleventh and Seventh Circuit opinions that have interpreted § 24 (Seventh) in the insurance context following this Court's opinion in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996). In *Blackfeet National Bank v. Nelson*, 171 F.3d 1237, 1249 (11th Cir.), *cert. denied*, 528 U.S. 1004 (1999), the Eleventh Circuit distinguished the specific enumerated power to sell insurance at section 92 of the National Bank Act, which was at issue in *Barnett Bank*, from the "broad, general" terms of section 24 (Seventh). The general language of section 24 (Seventh) did not, in the Eleventh Circuit's view, carry the same preemptive

force as did the specific language in section 92.[4] In *American Deposit Corp. v. Schacht*, 84 F.3d 834, 843 (7th Cir.), *cert. denied*, 519 U.S. 870 (1996), the Seventh Circuit came to the same conclusion. There, the Seventh Circuit noted this Court's "detailed analysis of section 92" in *Barnett Bank* and distinguished the specific power to sell insurance from the dissent's conclusion – based on section 24 (Seventh) – that "activities of national banks are simply not subject to state interference," which it rejected. *Id.*

The Ninth Circuit never addressed whether a state or local law preventing a double charge for a single automated teller machine transaction "significantly interfered" with a national bank power under this Court's analysis in *Barnett Bank*, because the Ninth Circuit found that all such laws by their very existence interfered with national banks' powers. The Ninth Circuit thus twisted this Court's conflict preemption analysis into field preemption. This was not only inconsistent with precedent; it was wrong.

The Fifth Circuit followed a similar analysis in finding preempted a Texas law that limited the fees that banks could impose on non-accountholders cashing checks. There, the Fifth Circuit found the Texas law in "irreconcilable conflict" with the § 7.4002 general authority to charge fees. *Wells Fargo*, 2003 WL 245633 at *5.

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[4] In the legislative history to the ATM Fee Reform Act of 1999, Congress quoted from the *Blackfeet* opinion to condemn the OCC's "unreasonable expansion of the powers of national banks beyond those intended by Congress." H.Rep. No. 74, 106th Cong., 1st Sess. 366 (1999).

B. The Courts are in Conflict Over Whether the Presumption Against Preemption Applies to State Banking Laws.

Four Circuit Courts – the First, Third, Ninth, and Eleventh Circuits – and the California Supreme Court are also in sharp conflict over whether the presumption against preemption applies to state laws regulating banking. The presumption against preemption requires "clear and manifest" evidence of Congressional intent to preempt a state law in an area of traditional state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This presumption is significant here, where the Ninth Circuit has implied preemption from regulatory silence. This Court does not lightly infer preemption. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). And in one of its most recent preemption opinions, *Sprietsma v. Mercury Marine*, ___ U.S. ___, 123 S.Ct. 518, 527 (2002), this Court found that a federal decision not to regulate recreational boat propeller guards did not implicitly preempt state regulation without some indication that Congress intended this result.

The First, Third, and Eleventh Circuits, and the California Supreme Court, have explicitly applied the presumption against preemption to state laws regulating banking, because of states' long history of regulating in the area. In *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993), the First Circuit applied the presumption against preemption to a Massachusetts law prohibiting various late charges on credit, finding that the law "visits two areas which are squarely within the ambit of the states' historic powers – banking and consumer protection." *Id.* (citations omitted). Significantly, in *Greenwood*

the First Circuit found the Massachusetts statute preempted not because it prohibited a fee, but because it was a usury law, expressly preempted by a federal statute establishing maximum interest rates that was based on section 85 of the National Bank Act. *Id.* at 829-30.

In *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980), the Third Circuit applied the presumption against preemption to a national bank's challenge to a New Jersey statute prohibiting discrimination in home mortgage lending. The Third Circuit noted that "[w]hatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863." *Id.* Though Congress could have regulated national banks to the exclusion of state control, the Third Circuit could find "only a few instances [where] Congress explicitly preempted state regulation of national banks." *Id.* Congressional support, the Third Circuit concluded, remains for dual regulation. *Id.*

In rejecting the preemption analysis that the Ninth Circuit applied here, the Eleventh Circuit also began its analysis with the presumption against preemption. *Video Trax*, 205 F.3d 1358 (adopting language at 33 F.Supp.2d at 1048.). The Eleventh Circuit recognized that for more than a century, Congress respected the dual state and federal roles in regulating banking. *Id.* The California Supreme Court applied the presumption against preemption to banking in two National Bank Act preemption cases, one of which was affirmed by this Court. *Peatros v. Bank of America*, 990 P.2d 539, 543 (Cal. S.Ct. 2000); *Smiley v. Citibank*, 900 P.2d 690, 696 (Cal. S.Ct. 1995), *aff'd*, 517 U.S. 735 (1996).

The Ninth Circuit refused to apply the presumption against preemption to banking. App. 10. Instead, the Ninth Circuit found that the "history of significant federal presence in banking" rendered the presumption against preemption inapplicable. *Id.* The Ninth Circuit relied on this Court's opinion in *United States v. Locke*, 529 U.S. 89, 108 (2000), where the Court found that the lack of an historic state role in regulating international and national maritime commerce prevented application of the presumption against preemption. *Id.* In doing so, the Ninth Circuit disregarded the history on which this Court based its earliest national bank preemption opinions: "national banks have traditionally been governed in their daily course of business far more by the laws of the State than of the Nation." *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). Thus, "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

No other Circuit Court joins the Ninth Circuit in rejecting the presumption against preemption in this context.

C. The Ninth Circuit's Holding that HOLA Preempts the Field of State Laws Concerning Automated Teller Machine Fees Conflicts in Principle with Decisions in the Eighth and Eleventh Circuits.

The Ninth Circuit's HOLA preemption analysis follows its National Bank Act analysis. First, the Ninth Circuit noted that HOLA regulations allow federal savings and loans to charge fees for any service, and to provide any

service through electronic means. App. 13. Then, the Ninth Circuit concluded that Petitioners' laws were preempted because they limited a fee for an electronic service. App. 15. Moreover, the Ninth Circuit found that the scheme of federal regulation of federal savings and loans is so "pervasive as to leave no room for state control." App. 14.

In contrast, the Eighth and Eleventh Circuits have held that HOLA does not preempt the field of federal savings and loan regulation. In *Flanagan v. Germania*, 872 F.2d 231, 234 (8th Cir. 1989), the Eighth Circuit found "without merit" a federal savings association's claim that HOLA, through its operations rules, preempted a state tortious interference with contract claim against the savings and loan's collection practices. The Eighth Circuit held that Congress had not occupied the field of state regulatory control over federal savings associations, and referred to concurring and dissenting opinions by Justices O'Connor, Rehnquist, and Stevens in *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982) to question whether Congress had the power to occupy this field, "even if it wished to." *Germania*, 872 F.2d at 234.

The Eleventh Circuit came to a similar conclusion in *Federal Deposit Insurance Corp. v. Stahl*, 89 F.3d 1510, 1515 (11th Cir. 1996). There, the Eleventh Circuit held that HOLA did not preempt a state law negligence claim against directors of a federal savings association for their approval of certain loans, because "courts have not found that federal law occupies the entire field in the regulation of federal thrifts under HOLA." *Id. See also Resolution Trust Corp. v. Gregor*, 872 F.Supp. 1140, 1143 (E.D.N.Y. 1994) (rejecting field preemption under similar facts.)

The Ninth Circuit's opinion also conflicts with this Court's affirmance of an earlier Ninth Circuit opinion that discussed the HOLA operations rules in more detail. *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980). In *Stein*, the Ninth Circuit was careful to distinguish the preemptive effect of procedural aspects of HOLA and its regulations – such as "regulations providing for monitoring, for enforcement and complaint resolution mechanism and for notice" from preemption of state substantive law. *Id.* at 1260. Here, the Ninth Circuit has completely overlooked this distinction, and expanded HOLA regulatory preemption into field preemption of all state substantive laws affecting federal savings and loans.

The Ninth Circuit's holding is inconsistent with the Office of Thrift Supervision's own HOLA regulations. Automated teller machine transactions and fees for those transactions are governed by the OTS Electronic Operations Rules. OTS Electronic Operations Rules, 63 Fed. Reg. 65673 (1998). When it promulgated these rules in 1998, the OTS expressly rejected a rule that would preempt all state and local regulation of ATM transactions in favor of a "case-by-case approach," and noted that state and local laws regulating electronic transactions are not preempted if they further a vital state interest, and have only an incidental effect on federal savings and loans' ability to provide financial services electronically. *Id.* at 65681.

In her concurring opinion in *de la Cuesta*, Justice O'Connor noted that Congress did not intend HOLA to preempt "application of all state and local laws" to federal savings and loans, especially those "not directly related to savings and loan practices." 458 U.S. at 171-72. And the

majority was careful to point out that its opinion rested on conflict, and not field preemption principles. *Id.* at 159 n.14. The Court should grant certiorari to clarify the limits of HOLA preemption in the context of state substantive laws that only incidentally affect savings and loan practices.

II. FEDERAL PREEMPTION OF STATE CONSUMER PROTECTION LAWS REGULATING FEES IS AN IMPORTANT AND RECURRING ISSUE FOR ALL STATES AND CITIES.

One commentator has noted that "The topic of surcharging has become of interest to virtually everyone."[5] Other comment on this case has noted that public entities considering laws similar to those involved here consider this to be a test case, and that a decision in favor of preemption will have a "chilling effect" on future laws.[6] And as another commentator wrote, "[g]iven the divergent opinions regarding the matter and the current state of the law, the ability of the states and municipalities to regulate surcharges remains unclear and in dispute."[7]

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[5] Melanie E. Doule, Comment, *Does Federal Law Preempt State or Local Laws that Ban ATM Surcharges?* 4 N.C. Banking Inst. 497 (2000).

[6] Ginger A. Bagley, Comment, *Can't Get Money for Nothing: An Analysis of ATM Surcharge Ban Demand*, 6 N.C. Banking Inst. 595, 607-08 (2002).

[7] Anita Famili, Note, *The Legality of Local ATM Surcharge Bans: The Case for the Cities of Santa Monica and San Francisco*, 74 So. Cal. L. Rev. 1353, 1355 (2001).

The scope of federal preemption over state laws regulating bank fees is a frequently litigated area in which this Court has yet to rule. Three Circuit Courts (the Fifth, Ninth, and Eleventh) and four state supreme courts (California, New Jersey, Oregon, and Washington) have addressed the issue, with conflicting results. *Wells Fargo*, ___ F.3d ___ (2003 WL 245633) (5th Cir. 2003); *Bank of America*, App. 1-26; *Video Trax*, 205 F.3d 1358; *Turner v. First Union National Bank*, 740 A.2d 1081 (N.J. S.Ct. 1999); *Vogt v. Seattle-First National Bank*, 817 P.2d 1364 (Wash. S.Ct. 1991); *Best v. United States National Bank of Oregon*, 739 P.2d 554 (Or. S.Ct. 1987); *Perdue*, 702 P.2d 503 (Cal. S.Ct. 1985), *appeal dismissed*, 475 U.S. 1100 (1986).

The state power to regulate bank fees has been litigated in the federal district courts and intermediate state courts in numerous states, with further conflicting results.[8] Eleven states and territories joined Petitioners as

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[8] *Goleta National Bank v. Lingerfelt*, 211 F.Supp.2d 711 (E.D. N.Car. 2002); *Goleta National Bank v. O'Donnell*, ___ F.Supp.2d ___ (2002 WL 31946062) (S.D. Ohio); *Metrobank v. Foster*, 193 F.Supp.2d 1156 (S.D. Iowa 2002); *Union National Bank v. Burke*, 48 F.Supp.2d 132 (D.Conn. 1999); *Ament v. PNC National Bank*, 849 F.Supp. 1015 (W.D. Pa. 1994); *Joy v. North*, 519 F.Supp. 1312 (D.Conn. 1981); *Lopez v. World Savings and Loan Assoc.*, 105 Cal.App.4th 729 (Cal.App. 2003); *Gibson v. World Savings and Loan Assoc.*, 103 Cal.App.4th 1291 (Cal.App. 2002); *Nelson v. Associates Financial Services Co. of Indiana*, ___ N.W.2d ___ (2002 WL 31423797) (Mich.App. 2002); *Moskowitz v. Washington Mutual Bank, F.A.*, 768 N.E.2d 262 (Ill.App. 2002); *Stoneking v. Bank of America, N.A.*, 43 P.2d 1089 (N.M. App. 2002); *Chavers v. Fleet Bank R.I. N.A.*, (2001 WL 506776) (R.I. Super. Ct. 2001); *Konynenbelt v. Flagstar Bank*, FSB, 617 N.W.2d 706 (Mich. App. 2000); *Chaires v. Chevy Chase Bank*, FSB, 748 A.2d 34 (Md.App. 2000); *Wallace v. National Commerce Bancorporation*, (1993 WL 44600) (Tenn.App. 1993).

amicus in this case. App. 68-70. In the four months since its publication, five courts have cited the *Bank of America* opinion.[9]

Congress has repeatedly stressed the importance of states' rights in the banking field. In amending the National Bank Act in 1994 to add section 43, which requires the OCC to formally publish any opinion that the National Bank Act preempts a state or local consumer protection law, Congress criticized what it considered to be "inappropriately aggressive" OCC preemption positions:

> the Conferees have been aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive resulting in preemption of State law in situations where the federal interest did not warrant that result.

H.R. Conf. Rep. No. 651, 103rd Cong., 2d Sess. 116-18 (1994). Congress was particularly concerned with the OCC's position that the National Bank Act preempted all state regulation of national bank fees:

> The Conferees have similar concerns regarding the scope of the OCC interpretive rule that appears at 12 C.F.R. § 7.8000, which broadly

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[9] *Ting v. AT&T*, 2003 WL 292296 (9th Cir. 2003) (unreported); *Cline v. Hawke*, 2002 WL 31557392 (4th Cir. 2002) (in dissent) (unreported), *Chowdhury v. Northwest Airlines Corp.*, 2002 WL 31934152 (N.D. Cal. 2002) (unreported); *American Bankers Association v. Lockyer*, 2002 WL 31941511 (E.D. Cal. 2002) (unreported); *Laskey v. Downey Savings and Loan Assoc.*, 2002 WL 31721686 (Cal.App. 2 Dist. 2002) (unreported).

> asserts that Federal law governing the deposit-taking functions of national banks preempts any State law that attempts to prohibit, limit, or restrict deposit account service charges. . . . the Conferees urge the OCC to review Interpretive Ruling 7.8000 to determine if it should be withdrawn or revised.

Id. at 117. *See also* H.Rep. No. 74, 106th Cong., 1st Sess. 365 (1999) (expressing concern over "the potential preemption of State consumer protection law by the OCC"). Congressional intent should have been the "ultimate touchstone" in the Ninth Circuit's preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But the Ninth Circuit has interpreted the National Bank Act in just the manner that Congress criticized, without acknowledging this legislative history.

The Court should grant *certiorari* in this case not just to protect decisional uniformity in the Circuit Courts and among state supreme courts, but also to protect the expressed intent of Congress that states retain the authority to legislate to protect their consumers in the banking fee area.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BANK OF AMERICA; WELLS FARGO BANK N.A.; CALIFORNIA BANKERS ASSOCIATION,

Plaintiffs-Appellees,

and

CALIFORNIA FEDERAL BANK,

Plaintiff-intervenor-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants,

and

CITY OF SANTA MONICA; PAMELA O'CONNOR, Mayor of the City of Santa Monica; KEN GENSER, Mayor Pro Tempore of the City of Santa Monica; RICHARD BLOOM, Council Member; MICHAEL A. FEINSTEIN, Council Member; ROBERT T. HOLBROOK; Kevin McKeown, Council Member; PAUL ROSENSTEIN, Council Member; MARSHA JONES MOUTRIE, City Attorney,

Defendants-Appellants.

No. 00-16355

D.C. No.
CV-99-04817-VRW

THE BANK OF AMERICA; WELLS FARGO BANK N.A.; CALIFORNIA BANKERS ASSOCIATION,

Plaintiffs-Appellees,

and

CALIFORNIA FEDERAL BANK,

Plaintiff-intervenor-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO; WILLIE BROWN, Mayor of the City of San Francisco; TOM AMMIANO, President, Board of Supervisors; ALICIA BECERRIL, SUE BIERMAN, AMOS BROWN; LESLIE KATZ; BARBARA KAUFMAN, MARK LENO; GAVIN NEWSOM, MABEL TENG; MICHAEL YAKI; LELAND YEE; Supervisors; LOUISE H. RENNE, City Attorney,

Defendants-Appellants.

No. 00-16394

D.C. No. CV-99-04817-VRW

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
January 17, 2002 – San Francisco, California

Filed October 25, 2002
Amended December 20, 2002

Before: Alfred T. Goodwin, Joseph T. Sneed and Stephen S. Trott, Circuit Judges

Opinion by Judge Sneed

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ORDER

The Opinion filed on October 25, 2002, is amended as follows: at slip Opinion page 6, delete the second full sentence beginning with "Bank of America, Wells Fargo . . . " and replace it with the following sentence: "Bank of America, Wells Fargo Bank, the California Bankers Association, and subsequently, California Federal Bank, *see infra*, (The "Banks") filed an action against the Cities seeking to invalidate the Ordinances.

The panel has voted to deny appellants' petition for rehearing. Judge Trott votes to deny the petition for rehearing en banc, and Judges Goodwin and Sneed so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and for rehearing en banc is denied.

OPINION

SNEED, Circuit Judge:

This appeal arises from the passage of municipal ordinances (the "Ordinances") by the cities of San Francisco and Santa Monica (the "Cities") prohibiting banks from charging ATM fees to non-depositors. Bank of America, Wells Fargo Bank, the California Bankers Association, and subsequently, California Federal Bank, *see infra* (The "Banks") filed an action against the Cities seeking to invalidate the Ordinances. The district court (1) found that

the Ordinances were preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §§ 1461-1470, and the National Bank Act, 12 U.S.C. § 24 (Seventh); (2) rejected the Cities' argument that the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r, permits the Cities to regulate ATM fees as a consumer protection measure; and (3) granted summary judgment in favor of the Banks and entered a permanent injunction prohibiting the Cities from enforcing the Ordinances. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In October and November of 1999, the cities of Santa Monica and San Francisco enacted virtually identical ordinances prohibiting "financial institutions" from charging ATM fees to non-depositors. The Ordinances define financial institutions as "any bank, savings association, savings bank, credit union, or industrial loan company," and target California's two largest banks, Bank of America and Wells Fargo Bank.

These Ordinances are enforced through private rights of action. Under the Ordinances, any consumer who pays an unlawful ATM fee may sue for "actual damages" of not less than $250 plus attorney fees and costs. In addition, punitive damages of up to $5,000 are allowed where the financial institution has engaged in a "pattern of willful violations." The Ordinances also permit consumers and municipal officials to seek injunctive relief.

The Banks dispute the validity of the Ordinances and began litigating almost immediately after the Cities enacted the Ordinances. The following is a summary of the parties' allegations and the procedural history.

(1) The Cities' Allegations.

The Cities allege that ATM fees charged to non-depositors harm consumers. They point out that non-depositors are charged twice for using an ATM.[1] They insist that ATM fees unduly burden the elderly, the disabled, and the poor because of their "lower mobility and [their] relative lack of choice over which ATMs to use."

The Cities also allege that ATM fees undermine competition in the local banking industry. The Cities argue that smaller banks and credit unions lose market share to larger banks because depositors seeking to avoid ATM fees transfer their accounts to banks that operate more ATMs in the Cities.

(2) The Banks' Allegations.

The Banks reject the Cities' characterization of the ATM market. They claim that ATMs are net "cost centers" for banks who on average lose between $8,000 and $11,000 annually per ATM. The Banks also dispute the Cities' contention that ATM fees have led to greater concentration in the local banking industry.

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[1] When a non-depositor uses an ATM owned by Wells Fargo Bank or Bank of America, he is charged a total of $3.50 for the transaction. Three categories of fees are involved in this transaction: (1) a $1.50 "surcharge" is charged by the bank operating the ATM, (2) a $2.00 "foreign fee" is charged by the customer's home bank for using an ATM operated by another bank, and (3) a $0.50 "interchange fee" is paid by the home bank to the bank operating the ATM. The Ordinances prohibit only the $1.50 surcharge ("ATM fee").

Additionally, the Banks argue that their ability to compete is impaired by the Ordinances. The Ordinances' definition of financial institution does not include all ATM operators. For instance, credit card companies are exempt from compliance because the Ordinances' limited definition of financial institution does not include them. This disparate treatment of ATM operators under the Ordinances would put the Banks at a competitive disadvantage.

(3) Procedural History.

Upon passage of the Ordinances, the Banks, not surprisingly, suspended ATM service to non-depositors. On November 3, 1999, the Banks filed a complaint against the Cities seeking a declaratory judgment that the Ordinances are pre-empted by the National Bank Act. On November 15, 1999, the district court preliminarily enjoined enforcement of the Ordinances pending resolution of this action. The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in concluding that preliminary injunctive relief was appropriate under the circumstances. *Bank of Am. v. City and County of San Francisco,* 215 F.3d 1332 (9th Cir. 2000).

On January 20, 2000, the district court granted California Federal Bank's ("Cal Fed") motion to intervene as a plaintiff in this action. The following day, Cal Fed filed its complaint against the Cities seeking a declaratory judgment that the Ordinances are preempted by the Home Owners' Loan Act as applied to federal savings banks. Subsequently, the parties filed cross-motions for summary judgment.

On June 30, 2000, the district court denied the Cities' cross-motion for summary judgment and granted summary judgment in favor of Cal Fed and the Banks. The district court rejected the Cities' claim that the savings clause in the EFTA permits the Cities to regulate ATM fees as a consumer protection measure. It held that the EFTA's anti-preemption provision is specifically limited to the EFTA and does not grant additional authority to the Cities to regulate national banks.

The district court found that the HOLA and the Office of Thrift Supervision's ("OTS") regulations occupy the entire field of ATM fees with respect to federal savings banks. It also found that the HOLA and OTS regulations authorize federal savings banks to charge ATM fees. Thus, the district court held that HOLA preempt the Ordinances. The district court also held that the National Bank Act and the regulations of the Office of Comptroller of Currency ("OCC"), which permit nationally chartered banks to charge ATM fees, pre-empt the Ordinances.

Because of these findings, the district court permanently enjoined the Cities from enforcing the Ordinances. The Cities appeal.

STANDARD OF REVIEW

The district court's grant of a permanent injunction is reviewed for an abuse of discretion. Any determination underlying imposition of the injunction is reviewed by the standard that is appropriate to that determination. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 2663 (2002). The district court's decision regarding preemption is reviewed de novo. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001)

(en banc), *cert. denied*, 122 S. Ct. 806 (2002). Its grant of summary judgment is also reviewed de novo. *Orr v. Bank of Am.*, 285 F.3d 764, 772 (9th Cir. 2002).

DISCUSSION

I. Preemption.

We find that the Ordinances are preempted by federal law and regulations and thus invalid by reason of the Supremacy Clause of the Constitution.[2] In determining whether a municipal ordinance is preempted by federal law, our sole task is to ascertain the intent of Congress. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Federal law may pre-empt state law in three different ways. First, Congress may preempt state law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemption may be inferred when federal regulation in a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In such cases of field preemption, the "mere volume and complexity" of federal regulations demonstrate an implicit congressional intent to displace all state law. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (internal quotations and citation omitted). Third, preemption may be implied when state law actually conflicts with federal law. *Fid. Fed. Sav.*

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[2] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

& Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Cities contend that all preemption analysis begins with the presumption against preemption. This rests on the assumption that Congress did not intend to supplant state law. However, the presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. 316, 325-26, 426-27 (1819), creating an extensive federal statutory and regulatory scheme. The history of national banking legislation has been "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank v. Nelson*, 517 U.S. 25, 32 (1996) (citations omitted). Indeed, since the passage of the National Bank Act in 1864, the federal presence in banking has been significant. *See id.* at 32-33. Similarly, since the passage of the HOLA in 1933, OTS regulations have governed the "powers and operations of every federal savings and loan association from its cradle to its corporate grave." *de la Cuesta*, 458 U.S. at 145, *quoting People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951). This court has recognized that regulation of federal savings associations

by the OTS has been so "pervasive as to leave no room for state regulatory control." *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980).

State regulation of banking is permissible when it "does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33. Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.[3] Nevertheless, because there has been a "history of significant federal presence" in national banking, the presumption against preemption of state law is inapplicable. *Locke*, 529 U.S. at 108; *see Barnett Bank*, 517 U.S. at 32-33; *Franklin Nat. Bank v. New York*, 347 U.S. 373, 375-76 (1954).

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[3] *See, e.g.*, 12 C.F.R. §§ 557.13(a) & 560.2(c) (state laws pertaining to contract and commercial law, tort law, criminal law, real property law, and homestead law are not preempted by OTS regulations); *de la Cuesta*, 458 U.S. at 172 ("Nothing in the language of . . . HOLA . . . suggests that Congress intended to permit the [OTS] to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.") (O'Connor, J., concurring); *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969) (allowing application of a Florida branch bank statute to national banks in the state); *Franklin Nat. Bank v. New York*, 347 U.S. 373, 378 n. 7 (1954) ("[N]ational banks may be subject to some state laws in the normal course of business if there is no conflict with federal law."); *see also Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) ("[R]egulation of banking has been one of dual [federal-state] control since the passage of the first National Bank Act in 1863."); *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 937 (1985) ("Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations."), *appeal dismissed*, 475 U.S. 1001 (1986) (noting lack of jurisdiction).

II. The Home Owners' Loan Act Preempts the Ordinances.

A. Historical Context.

The Home Owners' Loan Act of 1933 was enacted to restore the public's confidence in savings and loan associations at a time when 40% of home loans were in default. *See Stein*, 604 F.2d at 1257; *see also* S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); H.R. Rep. No. 55, 73 Cong., 1st Sess., 2 (1933). Congress enacted the HOLA as a result of its dissatisfaction with state regulation of home financing. *Stein*, 604 F.2d at 1257. The OTS, an office of the Department of the Treasury, was thus created and vested with plenary authority to administer the HOLA.[4]

B. The HOLA and OTS Regulations Authorize ATM fees.

The HOLA empowers the OTS, "under such rules and regulations as [it] may prescribe – to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations . . . , giving primary consideration of the best practices of thrift institutions in the United States." 12 U.S.C. § 1464(a). The HOLA authorizes the OTS to promulgate regulations "appropriate to carry out [its] responsibilities." 12 U.S.C. § 1463(a)(2). Pursuant to this authorization, the OTS

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[4] 12 C.F.R. §§ 500.1(a) (the OTS "is responsible for the administration and enforcement of the [HOLA]"), 500.10 (the functions of the OTS are to "charter, supervise, regulate and examine Federal savings associations"); *de la Cuesta*, 458 U.S. at 144 (noting that the Federal Home Loan Bank Board, the predecessor to the OTS, was created in 1932 to administer the HOLA).

regulates, inter alia, "the enforcement of laws, regulations, or conditions against such associations." 12 C.F.R. § 500.1(b).

The HOLA also permits federal savings associations to "establish remote service units for the purpose of crediting savings or demand accounts, debiting such accounts, crediting payments on loans, and [disposing] of related financial transactions as provided in regulations prescribed by the[OTS]." 12 U.S.C. § 1464(b)(1)(F). The OTS authorizes federal savings associations to use "electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity." 12 C.F.R. § 555.200(a). Electronic means or facilities include ATMs. *Id.* The OTS also permits federal savings associations to "transfer, with or without fee, [their] customers' funds from any account . . . of the customer at the Federal savings association or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device." 12 C.F.R. § 545.17.

A federal savings association's authority to conduct electronic fund transfers is not limited to its own depositors. Rather, it applies to any "customer." *Compare id. with* 12 C.F.R. § 555.200(b) (authorizing the marketing and sale of electronic capacities and by-products to third-parties). The OTS further permits federal savings associations to charge fees for deposit and lending-related services. *See* 12 C.F.R. § 545.17 (authorizing transfer of funds "with or without fee"); 12 C.F.R. § 557.12(f) (authorizing "service charges and fees" for deposit-related activities); 12 C.F.R. § 560.2(b)(5) (authorizing "loan-related fees, including . . . servicing fees"). It follows that a federal savings association may charge non-depositors for ATM services.

C. HOLA and OTS Regulations Preempt the Ordinances' ATM Fee Prohibition.

Having determined that the HOLA and OTS regulations permit federal associations to charge ATM fees to non-depositors, we also find that HOLA and OTS preempt the Ordinances.

Field preemption is implied when the scheme of federal regulation in a particular field is so pervasive as to leave no room for the States to supplement it. *Rice,* 331 U.S. at 230. "Federal regulations have no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153.

Indeed, the regulation of federal savings associations by the OTS is so "pervasive as to leave no room for state regulatory control." *Stein*, 604 F.2d at 1260. The Ordinances purport to regulate the operations, and the deposit and lending-related practices of federal savings banks. However, OTS regulations occupy these fields. *See* 12 C.F.R. § 545.2 (asserting field preemption of operations of federal associations); 12 C.F.R. § 557.11(b) (asserting field preemption of deposit-related practices of federal associations); 12 C.F.R. § 560.2(a) (asserting field preemption of lending-related practices of federal associations).

OTS Regulation 545 governs the operations of federal savings banks and expressly preempts contrary state law. Section 545.2 provides that the OTS has "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal savings associations." 12 C.F.R. § 545.2. It also provides that the exercise of this authority "is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." *Id.*

The Cities illogically contend that the charging of ATM fees is not part of the "operations" of a federal savings association. However, "operations" include "funds transfer services," which federal savings associations are authorized to provide "with or without fee." 12 C.F.R. § 545.17. Moreover, federal associations are authorized to use "electronic means or facilities to perform any function, or provide any product or service." 12 C.F.R. § 555.200(a).

Therefore, we hold that the HOLA and OTS regulations together preempt conflicting state limitations on the authority of federal savings associations to collect fees for provision of deposit and lending-related electronic services and that prohibition of ATM fees by the Ordinances is therefore invalid under the Supremacy Clause of the Constitution. Because the ordinances are preempted for attempting to regulate the operations of federal savings banks, we do not discuss the alternate justifications for preemption including field preemption of deposit and lending-related activities as well as conflict pre-emption.

III. The National Bank Act Preempts the Ordinances.

We also find that National Bank Act preempts the Ordinances.

A. Historical Context.

National banks are "instrumentalit[ies] of the federal government, created for a public purpose, and . . . subject to the paramount authority of the United States." *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978) (citation and internal quotation marks omitted). State attempts to control the conduct of national

banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties. *First Nat. Bank v. California*, 262 U.S. 366, 369 (1923). The supremacy of the federal government in regulating national banks has long been recognized.[5]

The National Bank Act of 1864 was enacted to protect national banks against intrusive regulation by the States. *See* Cong. Globe, 38th Cong., 1st Sess., 1451 (1864) (noting that the "object" of the National Bank Act was to "establish a national banking system" free from intrusive state regulation); *Marquette Nat'l Bank*, 439 U.S. at 314-15, ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a national banking system.") (internal quotations and citations omitted). To fulfill this Congressional purpose, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank*, 517 U.S. at 32 (citations omitted). Therefore, in determining the preemptive scope of federal statutes and regulations

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[5] *See Barnett Bank*, 517 U.S. at 32-36 (federal statute authorizing national banks to sell insurance in small towns preempts contrary state statute); *Franklin Nat. Bank*, 347 U.S. at 377-79 (national banks' express power to receive deposits preempts state statute prohibiting use of word "savings" by other than locally-chartered banks); *First Nat. Bank*, 262 U.S. at 369 (national banks' power to receive deposits preempts contrary state escheat law); *Easton v. Iowa*, 188 U.S. 220, 238 (1903) (state statute prohibiting receipt of deposits by insolvent banks is inapplicable to national banks); *M'Culloch*, 17 U.S. at 325-30 (states lack the power to tax national banks).

granting a power to national banks, the Supreme Court has adopted the view that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33.

B. Incidental Powers of National Banks under 12 U.S.C. § 24 (Seventh).

The National Bank Act of 1864, 12 U.S.C. § 24 (Seventh), confers upon national banks the authority:

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .

12 U.S.C. § 24 (Seventh).

The "business of banking" is not limited to the powers enumerated in § 24 (Seventh). *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n. 2 (1995). Therefore, the OCC "may authorize additional activities if encompassed by a reasonable interpretation of § 24 (Seventh)." *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000).

Incidental powers include activities that are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978), *quoting Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir.

1972). The incidental powers of national banks are thus not limited to activities deemed essential to the exercise of enumerated powers but include activities closely related to banking and useful in carrying out the business of banking. *First Nat'l Bank v. Taylor*, 907 F.2d 775, 778 (8th Cir. 1990), *cert. denied,* 498 U.S. 972 (1990).

C. OCC Regulations Authorize National Banks to Charge ATM Fees.

OCC Regulation § 7.5002 authorizes national banks to "deliver through electronic means and facilities any . . . service that [they are] otherwise authorized to . . . provide." 12 C.F.R. § 7.5002. Also, Regulation § 7.4003 authorizes national banks to operate ATMs pursuant to their incidental powers under 12 U.S.C. § 24 (Seventh). 12 C.F.R. § 7.4003. Finally, Regulation § 7.4002(a) authorizes national banks to collect "non-interest charges and fees, including deposit account service charges." 12 C.F.R. § 7.4002(a). The establishment of such fees "are business decisions to be made by each bank . . . according to sound business judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2).[6] These regulations make no

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[6] Regulation § 7.4002(b)(2) further provides:

> A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others: (i) The cost incurred by the bank in providing the service; (ii) The deterrence of misuse by customers of banking services; (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and (iv) The maintenance of the safety and soundness of the institution.

(Continued on following page)

distinction between depositors and non-depositors with respect to a national bank's authority to collect fees for provision of authorized services. It follows that national banks may charge ATM fees to non-depositors.

The OCC has similarly construed the National Bank Act.

D. The OCC Has Reasonably Construed the National Bank Act as Authorizing the Charging of ATM Fees to Non-Depositors.

We give "great weight" to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement. *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987). "As the administrator charged with supervision of the National Bank Act, the [OCC] bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank*, 513 U.S. at 256 (internal citations omitted).

In its *amicus* brief and in two interpretive letters issued following passage of the Ordinances, the OCC has construed the incidental powers of national banks under § 24 (Seventh) as encompassing the provision of ATM services to non-depositors at a charge. The OCC's position is reasonable and thus entitled to "great weight." *NationsBank*, 513 U.S. at 256-57.[7]

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12 C.F.R. § 7.4002(b)(2). The OCC found that the Banks had properly considered these factors in deciding to charge ATM fees to non-depositors.

[7] The Cities insist that the OCC's opinion letters and amicus briefs are not entitled to deference. As explained above, the Cities' argument

(Continued on following page)

The depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking. Although the ATM is a relatively new technology, the deposit and lending-related services offered through ATMs are traditional banking functions. As we held in *M & M Leasing Corp.*, "the National Bank Act did not freeze the practices of national banks in their nineteenth century forms. . . . [W]e believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." 563 F.2d at 1382. In our view, the widespread use of ATMs by banks to deliver deposit and lending-related services exemplifies a "new way[ ] of conducting the very old business of banking." *Id.*

We find no support in the Cities' contention that the charging of ATM fees to non-depositors renders the provision of ATM services beyond the incidental powers granted to national banks under § 24 (Seventh). As held in *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 147 (D. Conn. 1999), the notion that "determination of state regulatory authority over national banks' ATM services is predicated on who accesses the . . . ATMs, is without legal

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lacks merit. We find the OCC's opinion letters to be both persuasive and consistent with the National Bank Act and OCC regulations and thus at least "entitled to respect." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Moreover, that the OCC's construction of the National Bank Act comes to us in the form of an *amicus* brief does not make it "unworthy of deference." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (noting that an agency's position in an *amicus* brief is not "unworthy of deference" when "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

authority or sound rationale. The ATM service offered to [ ] non-depositors allows them to access their accounts at their own banks from a different geographic location and logically constitutes part of banking business."

The language of the National Bank Act provides no support for the Cities' position. To the contrary, Regulation § 7.4002(a) authorizes national banks to collect "non-interest charges and fees." 12 C.F.R. § 7.4002(a).

We hold that the National Bank Act and OCC regulations together preempt conflicting state limitations on the authority of national banks to collect fees for provision of deposit and lending-related electronic services and that prohibition of ATM fees by the Ordinances is therefore invalid under the Supremacy Clause of the Constitution.

IV. The EFTA Does Not Save the Ordinances from Preemption by the HOLA and the National Bank Act.

The Cities contend that the EFTA authorizes states to regulate ATM fees as a consumer protection measure. This argument fails on two grounds. First, regulation of ATM fees is not the type of consumer protection measure contemplated by the EFTA. Second, the EFTA's anti-preemption provision does not preclude preemption of state laws by the HOLA and the National Bank Act.

A. Regulation of ATM Fees Is Not the Type of Consumer Protection Measure Contemplated by the EFTA.

The Ordinances purport to protect consumers against "excessive fees" and "anti-competitive" business practices

that encourage consumers to hold their accounts at national banks who operate more ATMs in the Cities than state-chartered financial institutions. The Cities claim that prohibition of ATM fees is the type of consumer protection measure contemplated by the EFTA. However, the language and legislative history of the EFTA point to the contrary.

The stated purpose of the EFTA is to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems." 15 U.S.C. § 1693(b). The EFTA's "primary objective . . . is the provision of individual consumer rights." *Id.*

The language of the EFTA indicates that the consumer protection measures contemplated by it are aimed at promoting disclosure, preventing fraud, and allocating liability. *See* 15 U.S.C. § 1693c (requiring disclosure of terms and conditions of electronic transfers); § 1693d (requiring documentation of transfers); § 1693e (requiring a writing for preauthorized electronic fund transfers); § 1693f (establishing procedures for error resolution); § 1693g (outlining consumer liability); § 1693h (outlining the liability of financial institutions); § 1693i (establishing requirements for issuance of cards); § 1693j (suspending consumer obligations in instances of system malfunction); § 1693l (prohibiting waiver of consumer rights under the EFTA).

The EFTA's ambit thus extends to regulation of ATM transactions. 15 U.S.C. § 1693a(6). However, the EFTA does not regulate ATM fees. Prohibition of ATM fees is not the type of consumer protection measure contemplated by the EFTA. The EFTA was enacted to prevent fraud, embezzlement, and unauthorized disclosure in electronic

fund transfers, not to regulate service fees charged by financial institutions. *See Kashanchi v. Texas Commerce Med. Bank*, 703 F.2d 936, 940-41 (5th Cir. 1983) (noting that the "lack of a written record" and the "absence of any human contact" in electronic fund transfers were factors that "motivated Congress to pass the EFTA."), *citing* H.R. Rep. No. 95-1315, at 2 (1978) (Congress passed the EFTA because of its concern that electronic transactions were "much more vulnerable to fraud, embezzlement, and unauthorized use than the traditional payment methods."); *Wachter v. Denver Nat'l Bank*, 751 F.Supp. 906, 908 (D. Colo. 1990).

This is evident from the passage of the ATM Fee Reform Act of 1999,[8] which requires that ATM operators who impose a fee notify customers of imposition of the fee and of the amount and prohibits charging a fee unless the customer elects to continue with the transaction after receiving notice. 15 U.S.C. § 1693b(d)(3). By requiring that ATM operators notify customers of imposition of fees, Congress recognized that ATM operators can charge fees. Therefore, the prohibition of ATM fees is not the type of consumer protection measure contemplated by the EFTA.

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[8] The ATM Fee Reform Act of 1999, Pub.L. No. 106-102, §§ 701-05, 113 Stat. 1463 (1999), was enacted as part of the Gramm-Leach-Bliley Financial Modernization Act and is incorporated in the EFTA as 15 U.S.C. § 1693b(d)(3).

B. The EFTA's Anti-Preemption Provision Does Not Apply to the HOLA and the National Bank Act.

The EFTA contains an anti-preemption provision which provides that state laws affording greater protection to consumers than the EFTA are not preempted by the EFTA. It provides:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent *with this subchapter* if the protection such law affords any consumer is greater than the protection afforded *by this subchapter.*

15 U.S.C. § 1693q (emphasis added).

The Cities insist that § 1693q empowers them to regulate ATM fees charged by national banks and federal savings associations as a consumer protection measure. They claim that the EFTA's anti-preemption provision saves the Ordinances against preemption by the HOLA and the National Bank Act. However, the plain language of § 1693q indicates that it is limited to the EFTA. Section 1693q's reference to "this subchapter" indicates that the EFTA's anti-preemption provision does not apply to other statutes.

In *Bank One v. Guttau*, 190 F.3d 844 (8th Cir. 1999), the Eighth Circuit rejected the same argument raised by the Cities here that the EFTA's anti-preemption provision authorizes states to regulate ATMs operated by national banks irrespective of whether the state regulations are

preempted by the National Bank Act. The Eighth Circuit explained that the EFTA's "anti preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." *Id.* at 850. It thus held that a state regulation restricting a national bank's placement of, and advertising on, ATMs was preempted by the National Bank Act notwithstanding the EFTA's anti-preemption provision.[9] *Id.*

Because the EFTA's anti-preemption provision is limited to the EFTA, it does not save the Ordinances against preemption by the HOLA and the National Bank Act. *See Locke*, 529 U.S. at 106 (anti-preemption clause in Oil Pollution Act did not "extend to subjects addressed in the other titles of the Act or other acts" and therefore did not preclude preemption of state laws by Ports and Waterways Safety Act); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (anti-preemption clause in citizen-suit provisions of the Clean Water Act did not "preclude preemption of state law by other provisions of the Act.").

We hold that the EFTA does not save the Ordinances from preemption by the HOLA and the National Bank Act.

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[9] *See also Burke*, 48 F. Supp. 2d at 147 (The EFTA "does not contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Bank[ ] Act by an implicit reservation of the power to administratively regulate banks to the states.").

CONCLUSION

We hold that the HOLA and OTS regulations preempt the Ordinances from prohibiting federal savings associations to charge ATM fees to non-depositors. We also hold that the National Bank Act and OCC regulations preempt the Ordinances from prohibiting national banks to do the same. We further hold that the EFTA does not rescue the Ordinances from preemption. The district court correctly granted summary judgment and a permanent injunction prohibiting the Cities from enforcing the Ordinances.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BANK OF AMERICA, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

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No. C-99-4817-VRW

ORDER.

(Filed Jun. 30 2000)

Plaintiffs Bank of America, Wells Fargo, and California Bankers Association filed this action on November 3, 1999, seeking to enjoin the enactment of two municipal ordinances restricting ATM fees. This court issued a preliminary injunction on November 15, 1999. The court's injunction was summarily affirmed by the court of appeals on March 31, 2000. On January 20, 2000, the court granted California Federal Bank's ("Cal Fed") motion to intervene as a plaintiff in this action. Now before the court are amicus curiae Office of the Comptroller of the Currency's unopposed motion for leave to lodge its Ninth Circuit brief and the Office of the Thrift Supervision's unopposed motion for leave to appear as amicus curiae. The motions of the Office of Thrift Supervision and the Comptroller of the Currency are GRANTED. Also before the court are the parties' cross-motions for summary judgment. For the following reasons, the court GRANTS plaintiffs' motions and DENIES defendants' motions.

I

On October 12, 1999, the city council in Santa Monica adopted section 4.32.040 to its municipal code, forbidding ATMs operated by financial institutions from charging fees for non-accountholders use of the machines. On November 2, 1999, the voters in the City and County of San Francisco passed a nearly identical initiative, Proposition F, requiring the adoption of the same law into San Francisco's Municipal Code as Section 648.1. These laws were enacted with the stated goals of protecting consumers against excessive fees and of ensuring competition amongst smaller banks and credit unions.

On November 3, 1999, the banks commenced this action against the cities and various city officials, alleging that the ordinances as applied to nationally-chartered banks are preempted by federal law. The Office of the Comptroller of Currency ("OCC") was permitted to appear as *amicus curiae*. On January 20, 2000, Cal Fed intervened alleging that the ordinances as applied to federal savings banks are preempted by federal law.

The challenged ordinances prohibit the charging of fees for ATM services by "financial institutions." Other institutions are not regulated by these ordinances and, presumably, can continue to charge fees to their users. The ordinances prohibit only one class of ATM charges – surcharges levied against non-accountholder users of the machines by the financial institution which operates the machine. "Foreign fees" – charges levied by an ATM user's *own* bank for using another bank's ATM – remain lawful under the ordinances. Furthermore, bank ATM operators are still permitted to charge the non-accountholder's bank an "interchange fee" for processing the transaction. The

challenged laws are enforceable by private rights of action against the banks; any individual who is charged a fee in violation of the ordinances may bring an action. Santa Monica's law became effective on November 11, 1999. Due to plaintiffs' concerns regarding the enforceability of the Santa Monica ordinance despite this court's order, plaintiffs have complied with the Santa Monica ordinance by cutting off access to all non-accountholders.

II

Nationally-chartered banks, such as plaintiffs Bank of America and Wells Fargo, are heavily regulated by the National Bank Act, 12 USC § 21 *et seq* ("NBA"). This act authorizes nationally chartered banks to "exercise * * * all such incidental powers as necessary to carry on the business of banking." 12 USC § 24(Seventh). The primary regulator of banks chartered under the Act is the OCC. The OCC has the "discretion to authorize activities beyond those specifically enumerated" in the Act. *NationsBank of North Carolina v. Variable Annuity Life Insurance Corp,* 513 US 251, 258, n 2 (1995). The ordinances implicate an "incidental power" essential to the "business of banking." An OCC regulation expressly permits any national bank to "charge its customers non-interest charges and fees." 12 CFR § 7.4002(a). The OCC has issued opinion letters and filed briefs in this action, asserting its position that the ordinances are preempted by the NBA.

Similarly, federal savings banks, such as plaintiff-intervenor California Federal, are governed by the Home Owners Loan Act, 12 USC § 1461 *et seq* ("HOLA"). The Office of Thrift Supervision ("OTS") has the authority to implement HOLA. Cal Fed and the OTS contend that

HOLA completely preempts state laws which purport to regulate savings banks.

The cities contend the Electronic Funds Transfer Act, 15 USC § 1693 *et seq* ("EFTA", specifically enables local governments to enact consumer protection laws regarding ATMs. The EFTA establishes regulations for electronic transfers, including ATM transactions. The EFTA states that it does not preempt state regulations over electronic transfers as long at the states' laws are not inconsistent with the EFTA. States are specifically granted the right to enact legislation which provides greater consumer protection. See 15 USC § 1693q. The cities argue that the disputed ordinances fall within this provision and are thus explicitly permitted.

A recent 8th Circuit case has addressed this very question. In *Bank One,* the court enjoined an Iowa statute that prohibited banks without branches in the state from operating an ATM in the state and placed limits on advertising on the machines. See *Bank One v. Guttau,* 190 F3d 844 (8th Cir 1999). The court found that the statute violated the National Bank Act and held that the EFTA cannot "save" a statute which interferes with a national bank's exercise of its banking powers. See *id* at 850.

The banks argue that the so-called "savings" provision of the EFTA does not grant states or cities the right to interfere with fees charged by banks. Rather, the banks argue, the type of laws envisioned by the EFTA would be consumer protection laws, such as regulations regarding lighting, hours of operations, locations, foreign-language capabilities or advertisements. According to the banks, the ordinances ban conduct which falls squarely within the

banks' core functions and squarely outside the realm of consumer protection. The banks argue that the EFTA "savings" provision only applies to the EFTA itself; there is no indication that it addresses the preemptive effect of the NBA or HOLA.

The banks also argue that the cities' reliance on the EFTA is undermined by recent amendments to the act that require ATM operators to give notice of access fees to non-accountholder users. 15 USC § 1693b(d)(3). Implicit in Congress' decision to regulate notice of fees is the understanding that institutions may charge these fees. Congress, undoubtedly aware of local government efforts to ban fees, had an opportunity in enacting this amendment to state explicitly whether limits on fees are permitted. Congress failed to do so.

III

Both the banks and Cal Fed argue that the ordinances are preempted by governing federal law and not the EFTA. Federal law will preempt state law when: (1) federal law expressly preempts state law; (2) federal law occupies the field of regulation; or (3) federal law conflicts with state law. See *Fidelity Fed. Sav. & Loan Ass'n v de la Cuesta,* 458 US 141, 152-53 (1982).

A

Cal Fed claims two grounds for preemption of the ordinances, field occupation and conflict with federal law. ATM fees are argued to be controlled by HOLA and OTS regulations. The cities contend that the regulations cited

by Cal Fed (12 CFR §§ 545, 557, 560) pertain in no way to the ATM surcharge on non-accountholders.

Congress granted OTS plenary and exclusive authority to regulate all aspects of the operations of federal savings associations. See 12 USC § 1463(a) and § 1464(a). Section 1464(b)(1)(F) authorizes Cal Fed to establish remote service units (such as ATMs) for the purpose of crediting or debiting accounts, crediting loan payments, and the disposition of related financial transactions "as provided in regulations prescribed by the [OTS] Director." 12 USC § 1464(b)(1)(F). OTS implemented this statutory provision by issuing the Electronic Operations Rules, 12 CFR pt. § 555. These rules provide that a "Federal savings association * * * may use, or participate with others to use, electronic means of facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines." 12 CFR § 555.200(a). Authorized activities of federal savings banks include the right to collect fees for services, see 12 CFR § 557.12, and "to transfer, with or without fee, its customers' funds from any account (including a line of credit) of the customer at the [f]ederal savings bank or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device." 12 CFR § 545.17. Further, the OTS has interpreted these regulations to apply to ATM operations. HOLA and OTS occupy the field of ATM fee regulation.

The cities also claim that their ordinances do not conflict with HOLA and OTS regulations. Federal savings banks have authority to collect fees associated with ATMs, as described earlier. This authority conflicts directly with

the municipal ordinances that compel Cal Fed to provide these services for free. Therefore, both grounds for preemption are met. HOLA and OTS regulations preempt the cities' ordinances as applied to federal savings banks.

B

The banks contend the NBA preempts the ordinances as applied to nationally chartered banks. The cities claim that the ordinances do not infringe upon any express or incidental NBA powers and are, therefore, not preempted. In fact, the ordinances directly prevent national banks from exercising a power that is authorized by the NBA as "incidental to" the business of banking.

The NBA sets forth the framework for the creation, regulation, and operation of national banks, including the scope of banking powers. These powers are enumerated and comprise functions such as lending money and taking deposits, but also include "all such incidental powers as shall be necessary to carry on the business of banking." 12 USC § 24(Seventh). The cities claim that there are no provisions in the NBA that pertain to ATMs. The NBA authorizes national banks to provide services through ATMs. "A national bank may establish and operate an [ATM] pursuant to 12 USC § 24 (Seventh)." 12 CFR § 7.4003. These services are part of the business of banking. See *First Union National Bank v. Burke,* 48 FSupp 2d 132, 148 (D Conn 1999). Further, the banks are authorized to collect fees for the use of their ATMs under 12 CFR 7.4002 (a) & (b), as interpreted by the OCC. The NBA authorizes national banks to operate ATMs and charge a fee for their use. The cities' prohibition of these fees

conflicts with the authority of the NBA. The cities' ordinances are therefore preempted.

C

Both the banks and Cal Fed disagree with the cities' claims that the NBA, HOLA, and OTS regulations do not preempt the ordinances. The cities claim that the EFTA enables local government to enact consumer protection laws regarding ATMs. As shown above, the governing law for ATM fee regulations for nationally-chartered banks and federal savings banks is not the EFTA. The cities also claim that the "savings clause" of the EFTA constitutes federal anti-preemption legislation. See 15 USC § 1693q. Section 1693q provides:

> [t]his subchapter does not annul, alter or affect the law of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the [EFTA] . . . A state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

"This anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." *Bank One v. Guttau,* 190 F3d at 850. Nothing in the EFTA supports an inference that "Congress intended to disrupt other federal laws including the National Banking Act by an implicit reservation of the power to administratively regulate banks to the states." *First Union Nat'l Bank v. Burke,* 48 FSupp 2d at 147. This "savings clause" does not save the cities' ordinances from preemption by the NBA or the HOLA and OTS.

IV

In determining whether a preliminary injunction should be issued, the court must take into account either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and that balance of hardships tips sharply in its favor. See *GoTo.com Inc v The Walt Disney Co,* 202 F3d 1199, 1204 (9th Cir 2000). The standard for granting a permanent injunction is essentially the same, except that to obtain a permanent injunction the movant must attain success on the merits. See *Amoco Prod Co v. Village of Gambell, Alaska,* 480 US 531, 546 (1987). This court finds that both the banks and Cal Fed have demonstrated success on the merits and will suffer irreparable injury if the cities are not enjoined from enforcing these ordinances. Through enforcement of the ordinances, plaintiffs will suffer irreparable economic loss.

Santa Monica reasserts its contention that the court cannot order the city to suspend the ordinance. This argument is meritless. The court possesses ample authority to prevent Santa Monica from purporting to deputize its citizens and others to conduct litigation to enforce an invalid enactment. Santa Monica's evidentiary objections are not well taken. The OCC October 25 and 27, 1999, letters speak for themselves (Undisputed Fact No. 14) and the identity of non-branch deployers of ATMs is beside the point (Undisputed fact Nos. 18, 19).

Accordingly, defendant City and County of San Francisco, California, as well as the other San Francisco defendants in this action, are hereby permanently ENJOINED from placing into effect, enforcing or taking any other action under the San Francisco Ordinance, or

otherwise allowing the San Francisco Ordinance to become effective.

Defendant City of Santa Monica, California, as well as the other Santa Monica defendants are hereby permanently ENJOINED from enforcing or taking any other action under the Santa Monica Ordinance relating to charges for the use of ATMs and directed to suspend the Santa Monica Ordinance.

Plaintiffs shall submit an appropriate form of judgment. The bond previously posted shall secure the injunction herein granted.

IT IS SO ORDERED.

JUN 29 2000

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States
District Judge

12 U.S.C. § 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

* * *

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28 U.S.C. § 43. Interpretations concerning preemption of certain State laws

(a) Notice and opportunity for comment required

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title the

appropriate Federal banking agency (as defined in section 1813 of this title) shall –

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not les than 30 days in which to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

(b) Publication required

The appropriate Federal banking agency shall publish in the Federal Register –

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

(c) Exceptions

(1) No new issue or significant basis

This section shall not apply with respect to any opinion letter or interpretive rule that –

(A) raises issues of Federal preemption of State law that are essentially identical to those previously

resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

(2) Judicial, legislative, or intragovernmental materials

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

(3) Emergency

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if –

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with –

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title

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12 U.S.C. § 1464. Federal savings associations

(a) In general

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Director is authorized, under such regulations as the Director may prescribe –

(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and

(2) to issue charters therefor,

giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly.

(b) Deposits and related powers

(1) Deposit accounts

(A) Subject to the terms of its charter and regulations of the Director, a Federal savings association may –

(i) raise funds through such deposit, share, or other accounts, including demand deposit accounts (hereafter in this section referred to as "accounts"); and

(ii) issue passbooks, certificates, or other evidence of accounts.

(B) A Federal savings association may not –

(i) pay interest on a demand account; or

(ii) permit any overdraft (including an intraday overdraft) on behalf of an affiliate, or incur any such overdraft in such savings association's accounts at a Federal reserve bank or Federal home loan bank on behalf of an affiliate.

All savings accounts and demand accounts shall have the same priority upon liquidation. Holders of accounts and obligors of a Federal savings association shall, to such extent as may be provided by its charter or by regulations of the Director, be members of the savings association, and shall have such voting rights and such other rights as are thereby provided.

(C) A Federal savings association may require not less than 14 days notice prior to payment of savir gs accounts if the charter of the savings association or the regulations of the Director so provide.

(D) If a Federal savings association does not pay all withdrawals in full (subject to the right of the association, where applicable, to require notice), the payment of withdrawals from accounts shall be subject to such rules and procedures as may be prescribed by the savings association's charter or by regulation of the Director. Except as authorized in writing by the Director, any Federal savings association that fails to make full payment of any withdrawal when due shall be deemed to be in an unsafe or unsound condition.

(E) Accounts may be subject to check or to withdrawal or transfer on negotiable or transferable or other order or authorization to the Federal savings association, as the Director may by regulation provide.

(F) A Federal savings association may establish remote service units for the purpose of crediting savings or demand

accounts, debiting such accounts, crediting payments on loans, and the disposition of related financial transactions, as provided in regulations prescribed by the Director.

* * *

15 U.S.C. § 1693. Congressional findings and declaration of purpose

(a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

* * *

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15 U.S.C. § 1693a. Definitions

As used in this subchapter –

(1) The term "accepted card or other means of access" means a card, code, or other means of access to a consumer's account for the purpose of initiating electronic fund transfers when the person to whom such card or other means of access was issued has requested and

received or has signed or has used, or authorized another to use, such card or other means of access for the purpose of transferring money between accounts or obtaining money, property, labor, or services;

(2) The term "account" means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement;

(3) the term "Board" means the Board of Governors of the Federal Reserve System;

(4) the term "business day" means any day on which the offices of the consumer's financial institution involved in an electronic fund transfer are open to the public for carrying on substantially all of its business functions;

(5) the term "consumer" means a natural person;

(6) the term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone. Such term does not include –

(A) any check guarantee or authorization service which does not directly result in a debit or credit to a consumer's account;

(B) any transfer of funds, other than those processed by automated clearinghouse, made by a financial institution on behalf of a consumer by means of a service that transfers funds held at either Federal Reserve banks or other depositor institutions and which is not designed primarily to transfer funds on behalf of a consumer;

(C) any transaction the primary purpose of which is the purchase or sale of securities or commodities through a broker-dealer registered with or regulated by the Securities and Exchange Commission;

(D) any automatic transfer from a savings account to a demand deposit account pursuant to an agreement between a consumer and a financial institution for the purpose of covering an overdraft or maintaining an agreed upon minimum balance in the consumer's demand deposit account; or

(E) any transfer of funds which is initiated by a telephone conversation between a consumer and an officer or employee of a financial institution which is not pursuant to a prearranged plan and under which periodic or recurring transfers are not contemplated; as determined under regulations of the Board;

(7) the term "electronic terminal" means an electronic device, other than a telephone operatored by a consumer, through which a consumer may initiate an electronic fund transfer. Such term includes, but is not

limited to, point-of-sale terminals, automated teller machines, and cash dispensing machines;

(8) the term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an account belonging to a consumer;

(9) the term "preauthorized electronic fund transfer" means an electronic fund transfer authorized in advance to recur at substantially regular intervals;

(10) the term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing; and

(11) the term "unauthorized electronic fund transfer" means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit, but the term does not include any electronic fund transfer (a) initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such other person are no longer authorized, (B) initiated with fraudulent intent by the consumer or any person acting in concert with the consumer, (C) which constitutes an error committed by a financial institution.

* * *

15 U.S.C. § 1693b. Regulations

* * *

(3) Fee disclosures at automated teller machines

(A) In general

The regulations prescribed under paragraph (1) shall require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of –

(i) the fact that a fee is imposed by such operator for providing the service; and

(ii) the amount of any such fee.

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction, except that during the period beginning on

November 12, 1999, and ending on December 31, 2004, this clause shall not apply to any automated teller machine that lacks the technical capability to disclose the notice on the screen or to issue a paper notice after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.

(C) Prohibition on fees not properly disclosed and explicitly assumed by consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless –

(i) the consumer receives such notice in accordance with subparagraph (B); and

(ii) the consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Automated teller machine operator

The term "automated teller machine operator" means any person who –

(I) operates an automated teller machine at which consumers initiate electronic fund transfers; and

(II) is not the financial institution that holds the account of such consumer from which the transfer is made.

(ii) Electronic fund transfer

The term "electronic fund transfer" includes a transaction that involves a balance inquiry initiated by a consumer in the same manner as an electronic fund transfer, whether or not the consumer initiates a transfer of funds in the course of the transaction.

(iii) Host transfer services

The term "host transfer services" means any electronic fund transfer made by an automated teller machine operator in connection with a transaction initiated by a consumer at an automated teller machine operated by such operator.

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15 U.S.C. § 1693q. Relation to State laws

This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter. The Board shall, upon its own motion or upon the request of any financial institution, State, or other interested party, submitted in accordance with procedures prescribed in regulations of the Board, determine whether a State requirement is inconsistent or affords greater protection. If the Board determines that a State's requirement is inconsistent, financial institutions shall incur no liability under the law of that State for a good faith failure to comply with that law, notwithstanding that such

determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. This subchapter does not extend the applicability of any such law to any class of persons or transactions to which it would not otherwise apply.

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12 C.F.R. § 7.4002 National bank charges.

(a) Authority to impose charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges.

(b) Considerations.

(1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:

(i) The cost incurred by the bank in providing the service;

(ii) The deterrence of misuse by customers of banking services;

(iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and

(iv) The maintenance of the safety and soundness of the institution.

(c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by § 7.4001 and not by this section.

(d) State law. The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

(e) National bank as fiduciary. This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

[Former] 12 C.F.R. § 7.4002 National bank charges.

* * *

(d) State law. The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

* * *

[Former] 12 C.F.R. §7.8000 Charges by national banks.

(a) All charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or discussion with other banks or their officers.

(b) Establishment of deposit account service charges, and the amounts thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. In establishing deposit account service charges, the bank may consider, but is not limited to considering:

(1) Costs incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;

(4) Maintenance of the safety and soundness of the institution.

(c) A national bank may establish any deposit account service charge pursuant to paragraphs (a) and (b) of this section notwithstanding any state laws which prohibit the charge assessed or limit or restrict the amount of that charge. Such state laws are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks.

(d) This interpretive ruling does not apply to:

(1) Charges imposed by a national bank in its capacity as a fiduciary which are governed by 12 CFR part 9; and

(2) Service charges on dormant accounts which are governed by 12 CFR 7.7515.

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12 C.F.R. § 545.2 Federal preemption.

The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

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12 C.F.R. § 545.17 Funds transfer services.

A Federal savings association is authorized to transfer, with or without fee, its customers' funds from any account (including a line of credit) of the customer at the Federal savings association or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device, including cashier's checks, conforming with applicable laws and established commercial practices.

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12 C.F.R. § 555.200 How may I use or participate with others to use electronic means and facilities?

(a) General. A federal savings association ("you") may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

(b) Other. To optimize the use of your resources, you may market and sell, or participate with others to market and sell, electronic capacities and by-products to third-parties, if you acquired or developed these capacities and by-products in good faith as part of providing financial services.

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12 C.F.R. § 557.11 To what extent does federal law preempt deposit-related state laws?

(a) Under sections 4(a), 5(a), and 5(b) of the HOLA, 12 U.S.C. 1463(a), 1464(a), and 1464(b), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when appropriate to:

(1) Facilitate the safe and sound operations of federal savings associations;

(2) Enable federal savings associations to operate according to the best thrift institutions practices in the United States; or

(3) Further other purposes of HOLA.

(b) To further these purposes without undue regulatory duplication and burden, OTS hereby occupies the entire field of federal savings associations' deposit-related regulations. OTS intends to give federal savings associations maximum flexibility to exercise deposit-related powers according to a uniform federal scheme of regulation. Federal savings associations may exercise deposit-related powers as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect deposit activities, except to the extent provided in § 557.13. State law includes any statute, regulation, ruling, order, or judicial decision.

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12 C.F.R. § 557.12 What are some examples of preempted state laws affecting deposits?

The OTS preempts state laws that purport to impose requirements governing the following:

(a) Abandoned and dormant accounts;

(b) Checking accounts;

(c) Disclosure requirements;

(d) Funds availability;

(e) Savings account orders of withdrawal;

(f) Service charges and fees;

(g) State licensing or registration requirements; and

(h) Special purpose savings services.

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12 C.F.R. § 557.13 What state laws affecting deposits are not preempted?

(a) The OTS has not preempted the following types of state law, to the extent that the law only incidentally affects your deposit-related activities or is otherwise consistent with the purposes of § 557.11:

(1) Contract and commercial law;

(2) Tort law; and

(3) Criminal law.

(b) The OTS will not preempt any other state law if the OTS, upon review, finds that the law:

(1) Furthers a vital state interest; and

(2) Either only incidentally affects your deposit-related activities or is not otherwise contrary to the purposes expressed in § 557.11.

ATM FEES; ORDINANCE

(Filed Apr. 16, 1999)

This measure is an ordinance that would prohibit a bank or other financial institution from charging customers who do not have an account with the bank a fee for using one of the bank's automated teller machines in San Francisco.

The ordinance would be enforced through private lawsuits for damages or through actions for injunctions brought by the City or by private parties.

INITIATIVE MEASURE

Be it ordained by the people of the City and County of San Francisco:

Section 1. Findings and Purpose.

The people of the City and County of San Francisco find and declare that:

The rates and types of fees charged by financial institutions have increased at an alarming rate in recent years. According to a study conducted by the United States Public Interest Research Group (USPIRG), from 1993 to 1995, the rate of bank fees nationwide increased at least double the rate of inflation, as measured by the Consumer Price Index. The USPIRG study also found, from 1993 to 1995, average monthly maintenance fees for regular (non-interest bearing) checking accounts increased 22 percent.

Much of the increase in the overall amount of fees comes from the imposition of new fees. Banks now charge "human teller," "deposit-item return" (charge against persons depositing checks from others that bounce), "telephone access," and "computer access" fees. Only a few years ago, these services were provided for free.

Another of the new "fees" is a surcharge that many financial institutions impose on non-account holders for using their ATMs. This surcharge is in addition to an "off-us" fee that nearly all financial institutions already charge their account holders for using another institution's ATM. Together the surcharge and the "off-us" fee can total $4.00 for a mere $20.00 withdrawal. According to USPIRG, the average total is $2.41 per transaction, an amount that can still equal more than a 10% charge for withdrawing $20.00 of an account holder's own funds.

Industry advocates contend that ATM surcharges are necessary to compensate institutions for the use of their ATMs. However, those advocates fail to acknowledge a significant portion of the off-us fees are already paid to the institutions that own the ATM used by the non-account holder. Industry advocates also contend that ATM surcharges are necessary to finance the cost of installing new ATMs. However, as Senator Alfonse D'Amato testified on the floor of the Senate this year, "122,000 out of the 165,000 machines [in existence nationwide] were installed well before the double charges."

Despite the fact that financial institutions are already compensated for the use of their ATMs by non-account holders and the fact that they have proven themselves capable of installing tens of thousands of new ATMs without the imposition of ATM surcharges, financial institutions are imposing ATM charges in record numbers. According to Senator D'Amato, at the beginning of 1996, only 17% of ATMs imposed such surcharges. By 1998, the number of ATMs imposing surcharges has increased to 79%.

Imposition of ATM surcharges raises serious anti-competitive concerns. Large financial institutions with more ATMs (in California, just two banks own more than 60% of the ATMs in the state) are able to impose higher costs on account holders of small institutions who in many cases have little choice but to use the ATMs of the large institutions. Account holders who wish to avoid these surcharges are pressured to defect from small institutions to large institutions. This presents a perverse form of price competition where institutions can actually gain customers by raising prices. As University of Houston economist Paul Horvitz observed, "there is little downside to such a

strategy – either you gain substantial market share or earn substantial fee income."

Small banks and credit unions serve important functions in the local community by servicing segments of the population that might otherwise be neglected. Recent studies by the Federal Reserve Board and consumer groups have shown that credit unions and small banks tend to offer higher interest rates on deposits and tend to charge lower account fees. They are also often the leaders in providing the most efficient, consumer-friendly levels of service. Losing or even hobbling these efficient and low-cost institutions harms all customers. The elderly, who are often dependent on fixed incomes, are even more likely to be harmed because of their greater reliance on the higher rates of return offered to account holders at these smaller institutions. Likewise, younger persons in school or beginning careers are more likely to be harmed because of their reliance on lower account fees charged by the smaller institutions.

Federal and State laws do not adequately address the unfairness and anti-competitiveness of surcharges. Therefore, the Board finds that an ordinance prohibiting financial institutions from imposing a surcharge on non-account holders using their ATMs located in San Francisco is essential for the promotion and protection of the general welfare of the citizens of San Francisco. The purpose of the prohibition is to protect consumers from exorbitant and unfair fees and to protect smaller financial institutions from anti-competitive business tactics.

Section 2. Chapter VIII, Part 2 The San Francisco Municipal Code (Police Code) is hereby amended by adding Section 648.1 thereto, to read as follows:

Section 648.1. ATM Surcharges

(a) Definitions.

(i) "Access" means to use any function on the ATM, including but not limited to cash withdrawal, fund transfer, etc.

(ii) "Access device" means a card, code, or other means of access to a customer's account, or any combination thereof, that may be used by the customer to initiate an electronic fund transfer.

(iii) "Automated teller machine (ATM)" means any electronic information processing device that accepts or dispenses cash in connection with a credit, deposit, or convenience account. The term does not include devices used solely to facilitate check guarantees or check authorizations, or which are used in connection with the acceptance or dispensing of cash on a person-to-person basis, such as by a store cashier.

(iv) "Customer" means a natural person to whom an access device has been issued for personal, family, or household use.

(v) "Financial institution" means any bank, savings association, savings bank, credit union, or industrial loan company.

(vi) "Surcharge" means any fee charged by the financial institution for the use of the ATM.

(b) Prohibition on Certain Fees.

A financial institution may not impose a surcharge of any kind on a customer for accessing an ATM of that financial institution located in the City and County of San

Francisco with an access device not issued by that financial institution.

(c) Enforcement and Penalties.

(i) Civil Action. Any person injured by a violation of this ordinance may enforce its provisions by means of a civil action.

(1) Any financial institution that violates this ordinance shall be liable to the person injured for the actual damages as determined by a jury, or a court sitting without a jury, but in no case less than $250.

(2) Any financial institution that violates this ordinance shall also be liable for such attorney's fees and court costs as determined by the court. Furthermore, in cases where the financial institution has engaged in a pattern of willful violations, the financial institution shall be liable for punitive damages not to exceed $5,000 per violation.

(ii) Injunction.

(1) Any financial institution that commits an act or engages in any pattern and practice in violation of this ordinance may be enjoined therefrom by any court of competent jurisdiction.

(2) Action for injunction under this subsection may be brought by any person injured by a violation of this ordinance, by the City Attorney, by the District Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

(iii) Nonexclusive Remedies and Penalties. Nothing in this Section shall preclude any person from

seeking any other remedies, penalties or procedures provided by law.

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City Council Meeting 10-5-99 Santa Monica, California

ORDINANCE NUMBER ___ (CCS)

(City Council Series)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA MONICA ADDING SECTION 4.32.040 TO THE SANTA MONICA MUNICIPAL CODE, PROHIBITING SURCHARGES TO NON-CUSTOMERS AT AUTOMATED TELLER MACHINES IN SANTA MONICA

THE CITY COUNCIL OF THE CITY OF SANTA MONICA DOES HEREBY ORDAINS AS FOLLOWS:

Section 1. **Findings and Purpose**. The City Council of the City of Santa Monica hereby finds and declares that:

A. In recent years, financial institutions have begun imposing new and exorbitant fees on consumers. These fees have been increasing at more than double the rate of inflation.

B. Many of these fees are imposed for services which were routinely provided without charge only a few years ago.

C. One particularly onerous new fee is a surcharge that financial institutions impose upon non-account holders for using their Automated Teller Machines (ATMs). This fee in addition to the fee that financial institutions already charge their account holders for using another institution's ATM. Together, these two fees total an average of $2.57 per transaction, which equates to more than a 10% charge for withdrawing $20.00 of one's own funds through an ATM.

D. These exorbitant surcharges are not necessary either to compensate financial institutions for use of their ATMs or to finance new ATM machines because the institutions are already compensated. Financial institutions already receive a payment (called an "interchange fee") from the ATM user's home bank for providing the service of the ATM. This cost, in turn, is passed on to the ATM user by his or her home bank in the form of a "foreign fee." Since financial institutions are already being compensated for providing their ATMs to non-account holders, the recently-enacted surcharges represent a form of pure profit that bears no relation to actual cost.

E. The imposition of double charges detrimentally impacts competition by giving large financial institutions an unfair advantage over small banks and credit unions, which tend to provide higher interest, lower fees, and more consumer-friendly service, particularly to the elderly and young people.

F. The Surcharge is also anticompetitive and unfair since it removes any competition from the process of fee-setting. For more than twenty years, without the surcharge, financial institutions negotiated interchange fees and other fees with the ATM networks, and with each other. This form of negotiation served to keep fees reasonable, since all parties had an interest in keeping their own costs down. However, when the consumer bears the full brunt of a new fee, he or she has no leverage to negotiate with the financial institutions, and the result is unreasonable fees.

G. Federal and state laws do not remedy the deleterious effects of these surcharges. Local legislation is therefore essential to safeguard the general welfare in

Santa Monica by protecting consumers from exorbitant and unfair fees and protecting smaller financial institutions from anticompetitive business practices.

Section 2. Section 4.32.040 is hereby added to the Santa Monica Municipal Code to read as follows:

Section 4.32.040 Automated Teller Machine Surcharges.

(a) ***Definitions.*** *The following words and phrases shall have the following meanings when used in this Section:*

Access. *To use any function on the ATM, including cash withdrawal and fund transfer.*

Access Device. *A card, code, or other means of access to a customer's account, or any combination thereof.*

Automated Teller Machine or ATM. *Any electronic information processing device that accepts deposits or dispenses cash in connection with a credit, deposit, or convenience account. The term does not include devices used solely to facilitate check guarantees or check authorizations, or which are used in connection with the acceptance or dispensing of cash on a person-to-person basis, such as by a store cashier.*

Financial Institution. *Any bank, savings association, savings bank, credit union, or industrial loan company.*

User. *A natural person to whom an access device has been issued for personal, family, or household use.*

(b) ***Prohibition on Certain Fees.*** *A financial institution may not impose a fee of any*

kind on a user for accessing an ATM of that financial institution located in the City of Santa Monica with an access device not issued by that financial institution.

(c) ***Enforcement on Penalties.***

(1) ***Civil Action.*** *Any person injured by a violation of this ordinance may enforce its provisions by means of a civil action.*

(A) Any financial institution that violates this ordinance shall be liable to the person injured for the actual damages as determined by a jury, or a court sitting without a jury, but in no case less than $250.

(B) Any financial institution that violates this ordinance shall also be liable for reasonable attorneys' fees and court costs as determined by the court. In cases where the financial institution has engaged in a pattern of willful violations, the financial institution shall be liable for punitive damages not to exceed $5,000 per violation.

(2) ***Injunction***

(A) Any financial institution that commits an act or engages in any pattern and practice in violation of this ordinance may be enjoined therefrom by any court of competent jurisdiction.

(B) Actions for injunction under this subsection may be brought by any person injured by a violation of this ordinance, by the City Attorney, by the District Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

(3) ***Nonexclusive Remedies and Penalties.*** *Nothing in this Section shall preclude any person from seeking any other remedies, penalties or procedures provided by law.*

SECTION 3. Any provision of the Santa Monica Municipal Code or its appendices inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to the extent necessary to effect the provisions of this Ordinance.

SECTION 4. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

SECTION 5. The Mayor shall sign and the City Clerk shall attest to the passage of this Ordinance. The City Clerk shall cause the same to be published once in the official newspaper within 15 days after this adoption. This Ordinance shall become effective 30 days from its adoption.

APPROVED AS TO FORM:

/s/ Marsha Jones Moutrie
MARSHA JONES MOUTRIE
City Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A., WELLS FARGO BANK, N.A., and CALIFORNIA BANKERS ASSOCIATION, Plaintiffs, **v.** **CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, et al., and CITY OF SANTA MONICA, CALIFORNIA, et al.,** Defendants.	Nos. 99-17590 99-17591

On Appeal from the United States District Court
for the Northern District of California
No. C 99 4817-VRW
The Honorable Vaughn R. Walker, Judge

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA, CONNECTICUT, IOWA, MINNESOTA, NEVADA, NEW YORK, OREGON, WASHINGTON, WEST VIRGINIA, AND COMMONWEALTH OF NORTHERN MARIANA ISLANDS AND VIRGIN ISLANDS IN SUPPORT OF DEFENDANTS CITY AND COUNTY OF SAN FRANCISCO AND CITY OF SANTA MONICA

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* * *

The New York Times

October 15, 2000, Sunday, Late Edition – Final

Against the Grain On A.T.M. Fees

In California, where consumers have been especially angry about automated teller machine fees, one bank has broken ranks.

Last week, Washington Mutual, a savings bank based in Seattle, said it would eliminate the $1.50 fee it had levied in the state for A.T.M. transactions made by people who are not its customers. Washington Mutual had assessed these so-called surcharges only in California and Florida, where it had expanded through acquisitions; the bank is studying whether to remove the fees in Florida, too. It does not charge an A.T.M. fee for its own depositors.

Two of Washington Mutual's competitors in California, Bank of America and Wells Fargo, still charge such fees. Last year, the cities of San Francisco and Santa Monica passed ordinances banning the surcharges. Bank of America, Wells Fargo and the California Bankers Association sued to strike the ban, which was overturned three months ago by a federal judge.

In announcing Washington Mutual's decision, Deanna Oppenheimer, president of banking and financial services, said: "Consumers don't like surcharges. It gives them particular angst."

Imagine the angst other banks might suffer upon hearing what she added: "It's not going to have any significant impact on our financials."

But consumers may have more fodder for their complaints about A.T.M. fees: The San Francisco Chronicle

reported recently that bank of America and Wells Fargo took in a combined $5.5 million a year in A.T.M. surcharges in San Francisco alone.

Credit Union Journal

February 17, 2003

Erosion Of States' Rights Called 'Bubbling Hot'

In a battle that brings the escalating conflict over state regulatory authority to the fore, a coalition of sub-prime lenders is asking Congress for national legislation that would exempt them from the expanding patchwork of state predatory lending laws. The proposal, backed by the Coalition for Fair and Affordable Housing, threatens to emasculate state legislative and regulatory authority with a provision giving state charters the same preemption given federally chartered institutions.

The conflict could help reverse the flight from federal credit unions, as credit unions in several locales, including California, Georgia and Washington, D.C., have received or asked for NCUA backing in recent months to use the Federal CU Act to shield them from unpopular consumer requirements. In California it was the credit card disclosure law. In Georgia the state's new predatory lending laws. Washington, D.C., credit unions are also asking NCUA help in the efforts for a preemption from the District's new predatory lending law.

National banks are also flocking to federal regulators to shield them from onerous state laws on predatory lending, credit card disclosures, ATM surcharges, and mortgage loans, a situation that has threatened banking giant Wells Fargo's lucrative mortgage business in California.

Just last week a federal appeals court, the U.S. Court of Appeals for the Fifth Circuit in New Orleans, ruled that a Texas law prohibiting banks from charging non-account

holders a check-chasing fee is preempted for national banks.

"That's a bubbling, rising, hot issue," said Jonathan Lindley, chief lobbyist for NASCUS. "If all the federal institutions get exempted from state laws, then where does that put the state-chartered banks, savings and loans, and credit unions."

The emergence of credit union tax proposals in several states is also posing the federal charter as an attractive alternative. "The whole states' rights issue has become twisted and contorted," said Lindley.

Supreme Court, U.S.
FILED
APR 24 2003
CLERK

No. 02-1404

In The

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, and CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, and CITY ATTORNEY,

Petitioners,

vs.

BANK OF AMERICA; WELLS FARGO BANK, N.A., CALIFORNIA FEDERAL BANK, and CALIFORNIA BANKERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court of Appeals correctly held that ordinances barring automatic teller machine usage fees are preempted under regulations of the Office of Thrift Supervision ("OTS"), promulgated under the authority of the Home Owners' Loan Act of 1933, 12 U.S.C. §1461, where:

(a) OTS has expressly preempted and occupied the field of regulating federal savings association "operations," which are defined in regulations to include fees assessed for the transfer of funds by electronic means; and

(b) OTS has expressly preempted and occupied the field of service charges and fee assessments, including ATM fees; and

(c) Local ordinances regulating or barring ATM fee charges conflict with OTS' regulation of federal savings association fees and operations, and stand as an obstacle to the accomplishment of the federal regulation of associations.

RULE 29.6 DISCLOSURE

California Federal Bank has now merged into Citibank (West), FSB, which is ultimately a wholly owned subsidiary of Citigroup Inc., the only publicly traded corporation within the chain of ownership.

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REASONS TO DENY THE WRIT

Applying regulations of the Office of Thrift Supervision ("OTS") of the Department of the Treasury adopted under the authority of the Home Owners' Loan Act of 1933, 12 U.S.C. §1461, the Court of Appeals held that the assessment of fees or service charges for use of an automated teller machine by a non-account holder is one of the "operations" of a federal savings association. The Ninth Circuit found express field preemption of federal savings association "operations," based on yet another OTS regulation, *and* implied field preemption based upon the extensive federal regulation of association "operations." App. 14.

1. The Ninth Circuit's double-anchored decision presents no issue warranting the exercise of certiorari jurisdiction.[1]

A. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). OTS has "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal savings associations. . . . " 12 C.F.R. §545.2. "Operations" include "funds transfer services" furnished "with or without fee," 12 C.F.R. §545.17, by electronic means or otherwise, 12 C.F.R. §555.200(a). This authority is "pre-emptive of any state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. §545.2.

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[1] California Federal Bank adopts the statement of facts appearing in the Court of Appeals' opinion and the statement of the case appearing in the brief in opposition of the bank respondents.

The petition simply ignores the expressly preemptive OTS regulations relied upon by the Court of Appeals.

B. Petitioners attack the alternative holding of implied field preemption, claiming the Ninth Circuit overstated the breadth of federal regulation. Pet. 22-25. But the Court of Appeals relied on circuit precedent, summarily affirmed by this Court, when it described the regulation of federal savings associations as so "pervasive as to leave no room for state regulatory control." App. 14, quoting *Conference of Federal Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980).[2]

Even at that, the Court of Appeals recognized this rule of field preemption is discerning: federal regulation may not have a fully-displacing effect on state contract, commercial, tort, criminal, or real property law. App. 11, n.3.[3] But the Ninth Circuit necessarily classified the cities' rate-regulating ordinances as akin to "regulatory control over the lending institutions to insure that the substantive rights of [customers] are respected," *Stein*, 604 F.2d at 1256, thereby planting the ordinances firmly within

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[2] *Stein* was also discussed with approval in *de la Cuesta*, 458 U.S. at 160.

[3] The Ninth Circuit relied on Justice O'Connor's concurring opinion in *de la Cuesta*, 458 U.S. at 172, as well as OTS regulations, 12 C.F.R. §§557.13(a) & §560.21(c), dispelling petitioners' suggestion of conflict with the concurring opinion. Pet. 24. The dissenting justices did not think Congress authorized the regulation the Court found preemptive in *de la Cuesta*, 458 U.S. at 172 (Rehnquist, J., dissenting). That viewpoint is not in conflict with the Ninth Circuit's holding here.

traditionally preempted territory.[4] These ordinances unquestionably regulate the fees a federal association may charge for the services it provides as a depository and lending institution. App. 60 [§648.1(b)], 65-66 [§4.32.040(b)]. As the OTS noted in its Ninth Circuit *amicus curiae* brief, "the ATM fees targeted by the Ordinances bear directly on the deposit- and lending-related operations of [federally chartered savings associations]." OTS Amicus Brief, Case No. 00-16355, U.S. Ct. Appeals, Ninth Circuit, 12/19/00, at p. 16 ("OTS Am.Br.").

There is no direct *or* indirect conflict in the precedents. Rather, petitioners sponsor a flawed syllogism, which proceeds this way: the Ninth Circuit said regulation of federal savings associations broadly forecloses state or local regulation; some courts hold such federal regulation is not complete enough to preempt on the facts of particular cases arising before those courts; therefore – and ignoring altogether material differences between this case and the others they cite – the cities assert conflict in the case law. Pet. 23-24.

Thus, *Flanagan v. Germania*, 872 F.2d 231 (8th Cir. 1989), held that the federal government had not occupied the field to such an extent as to preempt Missouri's generally applicable tort cause of action for interference with contract as applied to allegations of association misconduct while collecting a particular loan. *Federal Deposit*

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[4] *Stein* distinguished state laws regulating the lending practices of federal savings associations to assure non-discrimination (subject to field preemption) from consumer lawsuits asserting violation of state anti-discrimination laws based on untoward lending practices (presenting a different preemption inquiry the court did not need to address).

Ins. Corp. v. Stahl, 89 F.2d 1510, 1515 (11th Cir. 1996), approved the application of state negligence law to the conduct of association directors based on specific, state law saving language found in 12 U.S.C. §1821(k), an altogether different statute from what is at issue here.[5]

Finally, petitioners assert conflict with the OTS Electronic Operations Rules, 63 Fed.Reg. 65673 (Nov. 30, 1998). According to petitioners, these envision case-by-case consideration of preemption. Pet. 24.

This rather pointless and incomplete contention misses the mark. "[T]he [Electronic Operations Rule, 12 C.F.R. §555.200,] will have preemptive effect [on state laws affecting ATM operations] where appropriate to: (1) facilitate the safe and sound operations of a Federal savings [bank], (2) enable a Federal savings [bank] to operate according to the best thrift institution practices in the United States, and (3) further other purposes of the [Home Owners' Loan Act of 1933] HOLA."). 63 Fed. Reg. 65673 at 65681, citing 12 C.F.R. §545.2 (operations), §§557.11-557.13 (deposits), and §560.2 (lending and investment). As OTS explained in its Ninth Circuit *amicus curiae* brief, responding to the very same argument by the cities:

> After articulating the general statement on preemption principles upon which San Francisco relies, the very next paragraph of the preamble

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[5] *Resolution Trust Corp. v. Gregor*, 872 F.Supp. 1140 (E.D.N.Y. 1994), also involves the application of state law to the liability of the directors of an association.

> explains that when OTS reviews state laws concerning electronic operations, it will focus on the underlying activity affected by the state law. And, referring *specifically* to deposit-related and lending-related activities, OTS explained "[f]or example, if a state law affects a Federal savings association's ability to take deposits or lend using electronic means and facilities, OTS will apply the part 557 or part 560 preemption analysis for deposit or lending activities, respectively.

OTS, Am.Br., pp. 9-10 (emphasis in original).

Turning to these regulations, OTS has expressly stated its intent to preempt state laws governing service charges and fees. 12 C.F.R. §557.12(f) ("OTS preempts state laws that purport to impose requirements governing . . . [s]ervice charges and fees . . . "); 12 C.F.R. §560.2(b) ("the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding . . . [l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees").

And turning next to ATM fees, the Chief Counsel of OTS concluded, in two separate letters, that the Santa Monica and San Francisco ordinances, respectively, do not apply to federal savings associations based on federal preemption.[6]

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[6] The letters are in the record as Exhibits D & E to the Roger declaration, filed April 10, 2000. The letter concerning the Santa Monica ordinance is dated November 22, 1999; the San Francisco letter

(Continued on following page)

2. Although it is unnecessary to venture further, the judgment in this case rests on other grounds that are established as a matter of law.[7]

A. The district court held that HOLA and allied OTS regulations "occupy the field of ATM fee regulation," App. 32, resulting in preemption of the cities' ordinances. This result rests not only on the express wording of OTS regulations, but also on field occupation:

> OTS has made clear its intention to occupy the field of regulation of a federal savings association's deposit-related and loan-related activities, including those conducted through electronic means. OTS has not banned or restricted ATM access fees. To the contrary, as noted above, to the extent a federal savings association performs deposit-related functions through ATMs, these functions are governed by OTS's regulations on deposits, which specifically occupy the field and preempt any state law restrictions on service charges and fees. To the extent a federal savings association performs loan-related functions through ATMs, these functions are governed by OTS's regulations on lending, which also specifically occupy the field and preempt any state law restrictions on loan-related charges and fees, including service charges.

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is dated December 7, 1999 and relies on the analysis in the earlier Santa Monica letter.

[7] The Court of Appeals acknowledged the existence of alternative grounds, but found it unnecessary to address them, given its decision on "operations." App. 15.

OTS Chief Counsel letter of November 22, 1999, to First Federal Bank of California, pp. 10-11 (footnotes omitted, citing 12 C.F.R. §557.12(f) and 12 C.F.R. §560.2(b)(5) [each quoted in pertinent part, *ante*]). OTS made the same point as *amicus curiae* in the Court of Appeals. OTS Am.Br. 25.

B. The judgment is also proper under conflict preemption principles, as OTS has maintained:

> federal regulations not only do not bar the Association from charging ATM access fees, the regulations specifically preempt state restrictions on the Association's authority to charge deposit-related and loan-related service charges and fees. The Ordinance, by contrast, bans such charges completely as to nonclients of the Association and other financial institutions. Because the Ordinance restricts what federal regulations allow, the Ordinance is an obstacle to the accomplishments of the full purposes and objectives of OTS's regulations. The Ordinance conflicts with OTS regulations and thus is preempted by federal law.

OTS Chief Counsel letter of November 22, 1999, at pp. 12-13; *see also* OTS Am.Br. 25-27.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 24, 2003

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-1404

IN THE

Supreme Court of the United States

THE CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, AND CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, AND CITY ATTORNEY,

Petitioners,

v.

BANK OF AMERICA, N.A.; WELLS FARGO BANK N.A.; THE CALIFORNIA BANKERS ASSOCIATION; AND CALIFORNIA FEDERAL BANK

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that ordinances which bar ATM usage fees are preempted under the National Bank Act, when (1) it is undisputed that national banks have authority under the Act to provide ATM services and to charge non-interest fees for their authorized services, (2) the Office of the Comptroller of Currency specifically confirmed the authority of national banks to charge the fees barred by the ordinances, and (3) all of the other federal courts that have decided the issue have held that state and local government laws prohibiting national banks' non-interest fees are preempted?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Respondent Bank of America, N.A., is a wholly owned subsidiary of NB Holdings Corporation, which is, in turn, a wholly owned subsidiary of Bank of America Corporation, a publicly traded corporation. No single shareholder owns 10% or more of Bank of America Corporation's publicly traded shares.

Respondent Wells Fargo Bank, N.A., is a wholly owned subsidiary of WFC Holdings Corporation, which is, in turn, a wholly owned subsidiary of Wells Fargo & Company. Wells Fargo & Company is a publicly traded corporation, in which no single shareholder owns 10% or more of its publicly traded shares.

Respondent California Bankers Association ("CBA") is a nonprofit trade organization of approximately 260 members, all of which are banks doing business in California. CBA does not issue securities, nor does it have any publicly owned parent, subsidiary, or affiliate companies.

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RESPONDENT BANKS' OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioners (the "Cities") argue that the Court of Appeals' decision regarding the authority of "national banks to charge non-interest fees is in direct conflict with opinions of the Eleventh Circuit and the California Supreme Court." Pet. 3. As respondents (the "Banks") will show, the Cities' conflict is based on their misreading of the two appellate decisions upon which they rely and their disregard of recent decisions of district courts in the Sixth, Eighth and Eleventh Circuits that reached the same conclusion as the Ninth Circuit in this case and the Fifth Circuit in another case. Moreover, this Court's own recent decisions show there is no conflict regarding a purported presumption against preemption in National Bank Act cases. Finally, the Banks will show that the Cities offer no other plausible arguments that warrant this Court's review.

STATEMENT OF THE CASE

A. The Ordinances

The Cities' nearly identical Ordinances prohibit any "financial institution" from imposing a "surcharge of any kind" for the use of an automated-teller machine ("ATM") card that is not issued by the institution that operates the ATM. SF Ord. §§ 2(a)(v) & 2(b) (Pet. App. 60-61); SM Ord. § 2(b) (Pet. App. 65-66). Thus, the Ordinances prohibit the Banks from charging non-depositors fees for using an ATM.

As their preambles make clear, the Ordinances are designed to force Bank of America and Wells Fargo – the two largest banks in California – to provide ATM services to the general public without directly charging for that service

in order to restructure competition in the banking industry.[1] Reflecting this purpose, the Ordinances do not apply to the hundreds of ATMs in San Francisco and Santa Monica that are operated by American Express, E*Trade, and other companies that are not "financial institutions" within the meaning of the Ordinances. Pet. App. 60, 65.

Enforcement of the Ordinances lies principally in the hands of the individuals who pay the proscribed fee. Even though advised by notices on the ATM terminal or its display screen that an ATM fee will be imposed and given the option to cancel the transaction before paying the fee, ER106; BSER36, 44,[2] the Ordinances give any person who pays even a single $1.50 ATM fee the right to sue for "actual damages" of not less than $250 plus attorney's fees and costs. SF Ord. § 2(c)(i) (Pet. App. 61); SM Ord. § 2(c)(1) (Pet. App. 66). Moreover, such persons are entitled to additional punitive damages of up to $5,000 per violation, if a financial institution has engaged in a "pattern" of "willful violations." SF Ord. § 2(c)(i) (Pet. App. 61); SM Ord. § 2(c)(1) (Pet. App. 66).[3]

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[1] The San Francisco Ordinance, for instance, states that "in California, just two banks [Bank of America and Wells Fargo] . . . are able to impose higher costs on account holders of smaller institutions who in many cases have little choice but to use the ATMs of the large institutions." The Ordinance asserts that the "[i]mposition of ATM surcharges raises serious anti-competitive concerns" by disadvantaging small banks with fewer ATMs. Pet. App. 58. *See also* SM Ord. § 1 (Pet. App. 64).

[2] "ER" refers to Petitioners' Excerpts of Record in the Court of Appeals. "BSER" refers to the Banks' Supplemental Excerpts of Record below.

[3] The Ordinances also allow the City Attorney, the District Attorney, or any person who will fairly and adequately represent the interests of the protected class to seek an injunction barring ATM charges (...continued)

B. The Economics Of ATMs

The Cities focus on the alleged costs and revenues of ATM operations, including the interchange fee established by networks that ATM owners receive from other banks. Pet. 9-10. While irrelevant to the question presented, the Cities' mischaracterization of the economics of the ATM market should not go uncorrected.

As the most recent Federal Reserve study referred to in the record shows, ATMs are net "cost [*not profit*] centers" for banks. Federal Reserve Banks, 1997 Commercial Banks Product Comparisons, National Average Report, at 204-05 (cited at BSER71 n.8). Thus, banks on average *lose* between $8,000 and $11,000 per terminal per year. *Id.* Per transaction, banks lose on average between twenty and fifty cents. *Id.*

The Cities ignore the competitive context in which national banks establish and operate such ATMs. Banks compete with the non-financial institutions that are not subject to the Ordinances. BSER76 (citing McAndrews, "ATM surcharges," *Current Issues in Economics and Finance*, Federal Reserve Bank of N.Y., Vol. 4, No. 4, Apr. 1998). Many lessors require ATM operators to split revenues generated from ATM user fees machines at the site as part of the lease payment. BSER77 (citing Dove Assocs., Inc., *1999 ATM Deployer Study* (Nov. 1998)). If the Banks are prohibited from charging ATM user fees, American Express and other ATM owners that are permitted to charge such fees will be able to compensate lessors with a share of the revenues from those locations, while the Banks would be unable to do so. The Ordinances would thereby deprive the

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by any financial institution. SF Ord. § 2(c)(ii) (Pet. App. 61-62); SM Ord. § 2(c)(2) (Pet. App. 66-67).

Banks of a fair opportunity to compete for ATM sites at high-volume locations, like airports and shopping malls.

C. The National Bank Act

This Court's most recent (and unanimous) decision involving preemption under the National Bank Act, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), recognized that there is a "history . . . of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empt[], contrary state law," citing *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368-69 (1923); *Easton v. Iowa*, 188 U.S. 220, 229-30 (1903); *Waite v. Dowley*, 94 U.S. 527, 533 (1876).

Under the Act, Congress has authorized national banks, like Bank of America and Wells Fargo, to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). Regulations issued by the Office of the Comptroller of the Currency ("OCC"), the agency that regulates national banks, interpret § 24(Seventh) as authorizing national banks to provide services via ATMs, 12 C.F.R. §§ 7.1019 & 7.4003, and to collect non-interest charges and fees for any banking services that they are authorized to provide, 12 C.F.R. § 7.4002.[4]

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[4] 12 C.F.R. § 7.4002 provides in pertinent part:

> (a) *Authority to impose charges and fees.* A national bank may charge its customers non-interest charges and fees. . . .
>
> (b) *Considerations.* (1) All charges and fees should be arrived at by each bank on a competitive basis . . . .
>
> (2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to

(...continued)

The OCC's First Senior Deputy Comptroller and Chief Counsel confirmed that "Bank [of America] may . . . charge the [ATM] fees it has established 'in its discretion' pursuant to the authority vested in the Bank by § 7.4002(a) [of the regulations] and § 24(Seventh) of the National Bank Act." ER76. This Court has made clear that the OCC's interpretation of the National Bank Act as embodied in OCC regulations and interpretative letters is entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 231 n.13 (2001); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).[5]

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sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if . . . it considers the following factors, among others:

(i) The cost incurred by the bank in providing the service;

(ii) The deterrence of misuse by customers of banking services;

(iii) The enhancement of the competitive position of the bank . . .; and

(iv) The maintenance of the safety and soundness of the institution.

(c) *Interest.* Charges and fees that are "interest" . . . are governed by § 7.4001 and not by this section.

(d) *State law.* The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

[5] The Cities merely mention the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, in the Statement of the Case, Pet. 7-8, thereby abandoning their argument below that the EFTA's saving clause, 15 U.S.C. § 1693q, avoids National Bank Act preemption. *See*

(...continued)

REASONS FOR OPPOSING THE WRIT

I. ALL FEDERAL COURTS THAT HAVE CONSIDERED STATE AND LOCAL LAWS PROHIBITING NATIONAL BANK NON-INTEREST FEES FOR SERVICES HAVE FOUND PREEMPTION

The Cities' argument that its petition is justified by the need to "resolve the conflict among the Eleventh, Ninth and Fifth Circuits and the California Supreme Court," Pet. 15, is completely unfounded.

In the past three and one-half years, seven different federal courts have confronted the question whether the National Bank Act, as interpreted in regulations issued by the OCC pursuant to that Act, preempts State or local laws that bar national banks from charging non-interest fees. In every instance, those courts have found preemption:

(1) the opinion of the district court in this case invalidating the Cities' Ordinances, Pet. App. 27-36;

(2) the unanimous opinion of the Court of Appeals in this case, Pet. App. 1-26;[6]

Pet. App. 21-23, rejecting that argument. *See also Bank One v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999), *cert. denied*, *Foster v. Bank One*, 529 U.S. 1087 (2000) (same). Moreover, the Cities' reference to a 1999 EFTA amendment, which mandates "Fee Disclosures at [ATMs]," Pet. 8, supports the Banks, because it would be inoperative if the EFTA allowed State and local governments to bar ATM fees. Similarly, the Cities' reference to unsuccessful "[p]revious federal [legislative] attempts to bar ATM surcharges outright," *id.*, helps the Banks, not the Cities.

[6] A different unanimous panel of the Ninth Circuit affirmed the district court's preliminary injunction, thereby rejecting basically the same arguments later advanced by the Cities in the appeal that prompted their petition to this Court. *Bank of America, N.A. v. City and County of San Francisco*, No. 99-17590, 2000 WL 340773 (9th Cir. Mar. 31, 2000).

(3) *Wells Fargo Bank of Texas, N.A. v. James*, 184 F. Supp.2d 588 (W.D. Tex. 2001) (holding Texas's check-cashing fee ban preempted);

(4) *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488 (5th Cir. 2003) (the unanimous opinion of the Fifth Circuit affirming the district court's decision);

(5) *Metrobank v. Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002) (holding Iowa's ATM usage fee ban preempted);

(6) *Bank of America, N.A. v. Lawson*, 2002 WL 31965741 (M.D. Tenn. Oct. 15, 2002) (holding Tennessee's check-cashing fee ban preempted);

(7) *Bank of America, N.A. v. Sorrell*, 2002 WL 32058517 (N.D. Ga. Dec. 18, 2002) (holding Georgia's check-cashing fee ban preempted).

In the Iowa, Tennessee and Georgia cases all three State Attorneys General determined not to appeal, even though the Iowa and Tennessee cases were decided before the Ninth Circuit's decision in this case and the Fifth Circuit's decision in *Wells Fargo v. James*. The acceptance by these State Attorneys General of the district court decisions regarding the preemption of national bank non-interest fees shows that the legal principles in this area are now clearly established. Indeed, they are so clear that the Tennessee Attorney General declined to defend that State's check-cashing fee ban and the statute was preempted by a consent judgment. *Id.*

The Cities' so-called "conflict" between the "Circuits" is based upon *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998), which the Eleventh Circuit affirmed *per curiam*, 205 F.3d 1358 (11th Cir.), *cert. denied*, 531 U.S. 822 (2000). *Video Trax* rejected the argument that bank overdraft fees were "interest" and thus could be regulated as "usurious" under 12 U.S.C. § 85, which generally limits the interest rates that can be charged

by national banks to the "rate allowed by the laws of the State, Territory, or District where the bank is located." *Id.* It went on to uphold the overdraft fees because they "substantially satisfy" the reasonableness factors set forth in 12 C.F.R. § 7.4002, the OCC's non-interest fee regulation, *see* p. 4 n.4, *supra*, and were "a fair and efficient method of allocating the administrative costs . . . ." 33 F. Supp. 2d at 1051. To the extent *Video Trax* is at all relevant here, it supports the Banks because it recognizes the central role of the OCC's fee regulation.

The Cities' reliance upon *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985), in the face of the uniform federal court bank-fee decisions, does not create a conflict or introduce any uncertainty as to the applicable law in this area. In *Perdue*, that was decided 15 years before the federal cases upon which the Banks rely, the California court held that "no provision of federal law discusses bank service charges." *Id.* at 942. In so holding, the California court refused to give any weight to a prior OCC regulation that authorized such charges. Subsequently, this Court in *NationsBank*, 513 U.S. at 257, held that courts should defer to the OCC's interpretation of the National Bank Act regarding the nature and extent of national bank authority. Moreover, *Perdue* held State law that allowed courts to determine whether prices were unreasonably high was "part of the common law governing all commercial transactions . . . [and] regulate[d] not only [the] sale of bank services but the sale of groceries, automobiles, furniture, or medical [devices]." 38 Cal. 3d at 943. That decision in no way supports local or State laws that prohibit national banks from charging any fee for their authorized services.

II. THERE IS NO "PRESUMPTION AGAINST PREEMPTION" IN NATIONAL BANK ACT CASES

The three Circuit decisions relied upon by the Cities to create a "conflict" regarding a "presumption against preemption," Pet. 20-21, do not help them: *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992), did not involve a national bank and found no preemption; *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980), involved a New Jersey statute prohibiting discrimination in lending and did not conflict with a national bank's exercise of its authorized powers under the National Bank Act; and *Video Trax*, upheld the bank fee at issue there. The Court of Appeals' rejection of the Cities' argument that there is a "presumption against preemption" which should have been applied by that court does not conflict with these other decisions.

More importantly, the Court of Appeals' decision is perfectly consistent with this Court's two most recent, relevant decisions. First, the holding in *Barnett Bank*, 517 U.S. at 32, in the course of striking down a Florida statute as preempted, that "grants of both enumerated and incidental 'powers' to national banks" by the National Bank Act are "*not normally limited by, but rather ordinarily preempt[ ] contrary state law*" is the antithesis of a presumption against preemption (emphasis added). Second, in *United States v. Locke*, 529 U.S. 89, 108 (2000), the Court rejected the argument that there was an "'assumption' of non-preemption . . . when the State regulates in an area where there has been a history of significant federal presence." The history of preemption of State law purporting to regulate the authorized activities of federally chartered banks reaches back to the beginnings of the Republic. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819).

In any event, presumptions play no role in this case. The Cities cannot dispute that national banks have the power under the National Bank Act to provide ATM services nor that the OCC's regulations permit national banks to charge fees for the authorized services. *See* pp. 4-5, *supra*. The Ordinances prevent the Banks from charging a fee which they establish for the use of that service. Even an anti-preemption presumption could not save the Ordinances.

III. THE ISSUE PRESENTED HERE DOES NOT MERIT THIS COURT'S PLENARY ATTENTION

The Cities' last-ditch argument that the importance of the issue in this case should lead to a grant of their petition is wholly without merit. Much of that argument, Pet. 25, is based upon questionable sources, similar to the Cities' reliance on "[o]ne writer [who] recently referred to federal preemption of state banking rules as a 'bubbling, rising, hot issue.'" Pet. 2. In fact, this is merely an item from the "Credit Union Journal" quoting a person identified as the "chief lobbyist for" the National Association of State Credit Union Supervisors. Pet. App. 73-74.

The Cities' reliance upon "Congress['s] . . . concern[ ] with the OCC's position that the National Bank Act preempted all state regulation of national bank fees," Pet. 27, is based on committee reports criticizing an OCC regulation that was withdrawn in 1994. Moreover, H.R. Conf. Rep. No. 651, 103rd Cong., 2d Sess. (1994), from which the Cities extensively quote, Pet. 27-28, made it clear that the only amendment to the National Bank Act enacted by Congress as a result of this "concern" was "intended to provide readily available and widespread notice to interested parties of the opportunity to comment on preemption," and that "[t]his process is not intended to . . . change the

substantive theories of preemption as set forth in existing law." H.R. Conf. Rep. No. 651, at 55.[7]

Specifically, the 1994 amendment simply requires the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretative rule ... that concludes that Federal law preempts the application to a national bank of [certain] State law[s] ...." 12 U.S.C. § 43(a). No such "opinion letter or interpretative rule" on preemption was sought by the Banks nor issued by the OCC in this case. The letter provided by the OCC to the Banks, p. 5, *supra*, addressed only their authority under the National Bank Act to charge fees for ATM services. The OCC subsequently filed an amicus brief in the Court of Appeals which advised the court of the agency's view that the Ordinances are preempted. *See* 12 U.S.C. § 43(c)(2), which provides that the notice and comment required for OCC preemption opinions and interpretative rules "shall not apply with respect to materials prepared for use in judicial proceedings ...."

Another strand of the Cities' "importance" argument is a lengthy string cite to various federal district court and State appellate decisions which they assert deal with State regulation of bank fees. Of the six federal court decisions, the two that decided national bank fee preemption issues went against the States.[8] Two others were dismissed for absention or lack of standing.[9] The fifth held that the

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[7] The Petition confusingly cites pp. 116-18 and 117 of the Conference Report, whereas the last page of that report is 67.

[8] *Metrobank*, 193 F. Supp. 2d 1156; *First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999).

[9] *Goleta National Bank v. O'Donnell*, No. C2-01-971, 2002 WL 31946062 (S.D. Ohio Dec. 18, 2002); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D. N.C. 2002).

National Bank Act preempted State laws governing credit card interest,[10] and the sixth simply upheld application of the State's business judgment rule.[11] Only one of the nine State cases cited by the Cities involved a national bank, holding that its contracts with depositors were subject to State law.[12] The eight others involved financial institutions governed by the Homeowners Lending Act ("HOLA"), 12 U.S.C. § 1461 *et seq.*, and other statutes.[13]

Finally, the Cities point to several States that joined a California amicus brief supporting their appeal of the district court's ruling. Pet. 26-27; Pet. App. 68. Much more important are the views of the OCC in the amicus briefs that it filed in this case, Pet. App. 19 & n.7, and in the *Wells Fargo* case, 321 F.3d at 490 & n.2, supporting the Banks' reliance on 12 U.S.C. § 24(Seventh) and the OCC's non-interest fee regulation, 12 C.F.R. § 7.4002.

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[10] *Ament v. PNC National Bank*, 849 F. Supp. 1015 (W.D. Pa. 1994).

[11] *Joy v. North*, 519 F. Supp. 1312 (D. Conn. 1981).

[12] *Wallace v. National Commerce Bankcorporation*, 1993 WL 44600 (Tenn. Ct. App. Feb. 23, 1993).

[13] The Banks will not address the Cities' attack upon the Ninth Circuit's decision that HOLA preempts the Ordinances. The California Bankers Association argued successfully in the district court that, if the Ordinances were preempted by virtue of their application to national banks, they could not be severed so as to apply only to State banks or other financial institutions. Accordingly, the district court ordered injunctive relief that prevented the San Francisco Ordinance from becoming effective and directed Santa Monica to suspend its Ordinance. Pet. App. 35-36. The Cities' appeal to the Ninth Circuit did not challenge the district court's non-severability ruling. Therefore, this Court's rejection of the Cities' arguments concerning preemption under the National Bank Act would moot the HOLA question that they raise in the petition.

CONCLUSION

For the reasons stated above, the petition should be denied.

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No. 02-1404

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Petitioners,

v.

THE BANK OF AMERICA; WELLS FARGO BANK N.A., CALIFORNIA FEDERAL BANK, AND THE CALIFORNIA BANKERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

California Federal's brief opposing certiorari is based on a factual misstatement regarding what the cities' ordinances do, and raises a new argument, never reached by the Ninth Circuit, that in itself shows why certiorari is necessary in this case.

Throughout its brief, California Federal argues that the cities' ordinances limit fees for savings and loans' deposit and lending services, and are thus preempted by the HOLA deposit and loan-related regulations. CalFed Brief in Opposition at 3, 5, 6, and 7. This argument is a straw man; the ordinances do not address any deposit or lending function. The ordinances prohibit banks from surcharging for the use of their ATMs to access accounts elsewhere. This transaction does not involve making or taking a deposit, or making a loan, from the ATM owner. The ATM merely connects the user to a third party's electronic network, and ultimately to a different bank. Indeed, the ATM surcharge at issue here is never imposed when a savings and loan's ATM dispenses or loans money to its own customers.

California Federal also raises a new argument that the Ninth Circuit did not address: whether a state law restricting ATM fees conflicts with HOLA because it "restricts what federal regulations allow." *Id.* at 7. If anything, this argument – based on an unpublished letter by the Office of Thrift Supervision's Chief Counsel – shows why this Court should grant certiorari and clarify the limits of preemption in this area.

The argument that HOLA regulatory permission implicitly preempts state regulation raises the specter of limitless preemption that concerned the Chief Justice,

Justice Stevens, and Justice O'Connor in their dissenting and concurring opinions in *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 171-72 (1982). There, the Chief Justice and Justice Stevens disputed that "Congress has enabled the Board to insulate federal savings and loans from California mortgage law merely by promulgating a regulation that declares these clauses to be enforceable." *Id.* at 175. Yet California Federal infers preemption from the regulatory permission to charge fees. CalFed Brief in Opposition at 6, 7.

Even the majority in *de la Cuesta* was careful to note that its opinion did not "explore the outer limits" of HOLA preemption because the state law at issue there implicated a federal savings and loan's mortgage lending practices, which were a "critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction." *de la Cuesta*, 458 U.S. at 167. Here, a federal savings and loan's ability to process ATM transactions that link non-customers with different financial institutions through a third-party's electronic network bears no relation whatsoever to its ability to receive deposits or make loans. And as Justice O'Connor wrote in her concurrence in *de la Cuesta*, Congress did not intend HOLA to displace local laws "not directly related to savings and loan practices," and "nothing in the Court's opinion should be read to the contrary." *Id.* at 172.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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